Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1839

DECATURVILLE SPORTSWEAR CO., INC., et al.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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To the United States Court of Appeals for the Sixth Circuit

Decaturville Sportswear Co., Inc., Marlene Industries Corporation, Trousdale Manufacturing Co., Inc., Westmoreland Manufacturing Corp., Aynor Manufacturing Co., Inc., and Loris Manufacturing Company, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit dismissing their petition to review the decision and order of the National Labor Relations Board directing that a hearing be conducted before an Administrative Law Judge on facts, issues, and events which had already been finally concluded in a contempt proceeding instituted by the National Labor Rela-

tions Board in the United States Court of Appeals culminating in the decision in *NLRB v. Decaturville Sportswear Co., Inc.*, 518 F.2d 788, *cert. denied*, 423 U.S. 913 (1975).

OPINIONS BELOW

The opinion of the Court of Appeals in the instant proceeding is not yet officially reported (Pet. App. A, pp. A-1-A-2). The order of the National Labor Relations Board, entered September 16, 1977, reversing its Administrative Law Judge who recommended a dismissal of an unfair labor practice complaint on the grounds of res judicata and collateral estoppel, is set forth and reproduced, infra (Pet. App. D, pp. A-14-A-17). The decision of the Administrative Law Judge, entered April 7, 1977, sustaining the defenses of res judicata and collateral estoppel premised on the prior contempt action in *NLRB v. Decaturville Sportswear Co., Inc.*, 518 F.2d 788, *cert. denied*, 423 U.S. 913 (1975), is reproduced, infra (Pet. App. E, pp. A-18-A-29). The findings and conclusions of the Special Master appointed by the Court of Appeals to hear the evidence against the petitioners in the petition for contempt filed by the National Labor Relations Board, which was adopted by the Court of Appeals, are set out in two memoranda and are reproduced, infra (Pet. App. F, pp. A-30-A-93).

JURISDICTION

The order of the Court of Appeals was entered March 30, 1978 (Pet. App. A, pp. A-1-A-2). The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. Whether the order of the National Labor Relations Board, entered September 16, 1977, reopening the record and directing a further hearing on the same identical facts which had been

fully and finally litigated in *NLRB v. Decaturville Sportswear Co., Inc.*, 518 F.2d 788, *cert. denied*, 423 U.S. 913 (1975), is a final order of the National Labor Relations Board reviewable by a Court of Appeals pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 USC § 160(f).

2. Whether the doctrines of res judicata and collateral estoppel prevent the National Labor Relations Board from conducting a subsequent unfair labor practice proceeding before an Administrative Law Judge on complaints alleging facts, episodes, and events fully and completely litigated and finally determined adversely to the Board in a contempt action instituted by the Board in a Court of Appeals.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 USC § 151, et seq.), are as follows:

> "Sec. 10(b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency at a place therein stated, not less than five days after the serving of said complaint; *provided* that no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of a charge with the Board and the service of a copy thereof upon the person against whom such charge is made.
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> • • • • • • •
>
> "Sec. 10(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief

sought may obtain a review of such order in any Circuit Court of Appeals in the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in Section 2112 of Title 28, United States Code. * * *"

STATEMENT

A. The Prior Contempt Proceeding.

On June 23, 1970, Nelson Rushing, a presser at the plant of Decaturville Sportswear Co., Inc., Decaturville, Tennessee, was discharged for insubordination. The same day, approximately 54 other pressers, in protest of Rushing's discharge, refused to return to work and were in turn themselves discharged. The discharged pressers and other employees acting in sympathy with them began picketing the plant as Decaturville. About July 15, 1970, the International Ladies' Garment Workers' Union [subsequently called "the Union"] began picketing plants of Trousdale Manufacturing Co., Inc., Hartsville, Tennessee; Westmoreland Manufacturing Corporation, Westmoreland, Tennessee; Aynor Manufacturing Company, Inc., Aynor, South Carolina; Loris Manufacturing Company, Inc., Loris, South Carolina; and Frisco Sportswear Co., Inc., Frisco City, Alabama. After the commencement of the picketing, the petitioners forwarded letters to the striking employees, directing them to return to work or risk replacement by permanent

replacements. Peggy Cagle and Judy Scott Maness received such letters from Decaturville Sportswear Co., Inc. Neither had advised the company of their reasons for joining the strike. When they came back, they were denied reinstatement because of their job having been filled by replacements (Pet. App. F, pp. A-62-A-64).

At Loris Manufacturing Co., Inc., three employees, Bryce Todd, Robert Stephens, and Robert Richardson, left the plant and joined the pickets after the strike began July 16, 1970. The plant manager wrote each a letter directing him to return to work by a specified time or be replaced. None of the three employees returned by the deadline. In October, 1970, all three employees quit the strike and submitted an unconditional offer to return to work. They were advised by the plant manager that since they had not returned within the time specified, replacements had been hired and the three would be returned to work as soon as a job became available (Pet. App. F, pp. A-82-A-83).

Randy Montgomery walked out of the Frisco Sportswear Co., Inc., plant "because a plant guard would not grant permission to Montgomery to cross the picket line to ask his sister for keys for a car" after the picketing began. On August 7, 1970, Sandra Matchett, another Frisco employee, joined the strike. Like Montgomery, she received a letter from the plant manager directing her to return to work by a specified date or be replaced. She did not return by the appointed date. On November 28, 1970, Matchett unconditionally offered to return to work. The plant manager advised her that he had no openings and, relying upon the letter which he had sent her, stated that she had been given a chance to return and she had refused. She was accordingly denied reinstatement (Pet. App. F, pp. A-87-A-90).

All of these events are fully described in the memoranda of the Hon. Harry W. Wellford, United States District Judge

for the Western District of Tennessee, appointed by the United States Court of Appeals for the Sixth Circuit as Special Master to hear the evidence on the allegations set forth in the petition for contempt filed against the petitioners in the United States Court of Appeals for the Sixth Circuit by the National Labor Relations Board on September 21, 1971, seeking an adjudication of contempt against the petitioners for alleged violations of the previous decree of the Court of Appeals, *NLRB v. Decaturville Sportswear Co., Inc.*, 406 F.2d 886 (6th Cir. 1969).

On October 5, 1973, Judge Wellford issued his first memorandum as Special Master. On June 12, 1974, the Special Master filed his second memorandum (Pet. App. F, pp. A-30-A-93).

The Special Master concluded that Nelson Rushing had been discharged "for his concerted activity with others in the pressing department, which activity he initiated, but also for his public and adamant refusal to meet with the company plant manager to discuss the problem and complaint. Thus, Rushing was insubordinate and, accordingly, was discharged for just cause, even though Rushing was protesting what he believed was unfair . . . The discharge of Nelson Rushing, therefore, constituted neither an unfair labor practice nor a violation of the decree of this Court." (Pet. App. F. pp. A-53, A-62-A-63)

Regarding the pressers who walked out in sympathy with Rushing, the Special Master observed: "The remaining pressers were not justified in their demand that Rushing be reinstated or rehired by plant manager Anderson on June 23, 1970, before they would return to work. These pressers were not discharged by the company unreasonably under the circumstances, despite anti-union sentiment on the part of the company." (Pet. App. F, A-63).

Concerning the right to reinstatement of the other employees at Decaturville and elsewhere, who walked out in sympathy with the pressers at Decaturville, the Special Master concluded that

"there is insufficient clear and convincing proof establishing that picketing at the Loris plant was solely to protest an unfair labor practice . . . All 'concerted activity' is not protected by Section 7 of the National Labor Relations Act . . . Todd and Stephens joined the pickets in front of the company's plant in Loris in an effort to get a union into the plant, as well as to protest what they considered an unfair or unjust practice. They assumed a status of economic strikers who might be subject to permanent replacement under certain conditions." (Pet App. F, p. A-82). Regarding Randy Montgomery and Sandra Matchett at Frisco City, the Special Master concluded "Montgomery and Sandra Ann Matchett walked out without making any effort to advise management of the nature of their grievance concerning any alleged unfair labor practice. Since all 'concerted activity' is not protected by Section 7 of the National Labor Relations Act, the picketing activities of the Frisco employees were not so protected in this instance. Thus, when Montgomery and Matchett joined the pickets in front of the company's plant in Frisco City in July and August, 1970, they assumed a status of economic strikers who are subject to replacement . . . They were directed to return to work within a reasonable time and did not, so they thereby rendered themselves subject to replacement. Upon their later reapplication, Frisco did not violate either the National Labor Relations Board or the Court's decree when they were not immmediately reinstated when they applied for work." (Pet. App. F, pp. A-89-A-90).

These findings, conclusions, and recommendations of the Special Master were assailed by the National Labor Relations Board before the Sixth Circuit. Yet, those findings, conclusions, and recommendations were adopted by the Court of Appeals, without modification, because

> "A review of the record of this case, including the exceptions to the Special Master's report, and the briefs filed in support of those exceptions fails to convince this Court

that the Special Master's findings, which were based on two years of fact finding were clearly erroneous * * *"
518 F.2d at 790.

On October 20, 1975, this Court denied the Board's petition for certiorari to review this decision of the Court of Appeals, 423 U.S. 913 (1975).

B. **The Subsequent Unfair Labor Practice Proceeding.**

On June 29, 1976, the Regional Director for Region 26 of the Board at Memphis issued a complaint in Cases Nos. 26-CA-3642, et al. (Pet. App. G, pp. A-94-A-105). On July 13, 1977, John S. Irving, General Counsel of the National Labor Relations Board, consolidated for trial the complaints issued by the Regional Directors for the 9th, 15, and 26th Regions. On August 17, 1976, the Regional Director for Region 11 issued a complaint in Cases Nos. 11-CA-5748 and 5749 (Pet. App. I, pp. A-112-A-119). On September 8, 1976, the Regional Director for Region 9 issued a complaint in Case No. 9-CA-8610 and 8888 (Pet. App. J, pp. A-120-A-127).

A cursory examination of these complaints will clearly indicate that the events which the National Labor Relations Board again seeks to litigate are identical in character to those which were decided in the contempt proceeding. Specifically, in paragraph 7 of the complaint issued in Case No. 26-CA-3642 appear the names of the 54 pressers who were involved in the contempt proceeding at Decaturville. Paragraphs 8 and 9 allege the reasons for the discharges of those pressers, which, as we have seen, have already been fully covered by Judge Wellford and the Court of Appeals (Pet. App. F, pp. A-54-58, 63). In paragraphs 10, 13, 14, and 15 are allegations concerning the commencement of the strike on July 23, 1970, at Decaturville, and July 16, 1970, at Westmoreland Manufacturing Corporation and Trousdale Manufacturing Co., Inc., in Tennessee, and in

paragraphs, 13, 14, and 15 are listed the names of individuals who allegedly applied for reinstatement in 1974 on the same terms as did Peggy Cagle and Judy Scott Maness at Decaturville, Bryce Todd, Robert Stephens, and Robert Richardson at Loris; and Randy Montgomery and Sandra Matchett at Frisco City. The only difference in the allegations in the contempt petition and those set forth in Case No. 26-CA-3642, et al., is the interval between the date of the individuals' applications for reinstatement. The same strike is alleged to have occurred in both proceedings.

The petitioners answered the complaint and raised the defenses of res judicata and collateral estoppel, relying upon the decree of the Court of Appeals for the Sixth Circuit in *NLRB v. Decaturville Sportswear Co., Inc.*, 518 F.2d 788 (6th Cir. 1975), *cert. denied*, 423 U.S. 913 (1975). The matters alleged in the subsequent complaints involve the identical issues, facts, or events as had been resolved by the Special Master and the Court of Appeals in the contempt action.

Nevertheless, a hearing was held at Decaturville, Tennessee, on September 28, 1976, before Administrative Law Judge Irvin H. Socoloff. Judge Socoloff directed the parties to file statements respecting the validity of the affirmative defenses of res judicata and collateral estoppel raised by the petitioners' answers which relied upon the decree of the Court of Appeals.

On April 7, 1977, Judge Socoloff issued his decision and concluded: "The allegations of the complaint herein charging violations by respondents of Section 8(a)(3) and (1), are barred by the applicable *res judicata* and *collateral estoppel* principles." (Pet. App. E, p. A-28). The full text of Judge Socoloff's decision is reproduced, infra (Pet. App. E, pp. A-18-A-29). On September 16, 1977, the National Labor Relations Board issued its order, construing the decision of the Court of Appeals in *NLRB v. Decaturville Sportswear Co., Inc.*, 518 F. 2d 788 (6th Cir. 1975), *cert. denied*, 423 U.S. 913 (1975),

and stated: "Under relevant principles of law as enunciated in numerous decisions the doctrines of *res judicata* and *collateral estoppel* are not applicable where the standard of proof has been higher in the first action than in the second." Accordingly, the Board overruled the petitioners' defenses of res judicata and collateral estoppel; ordered the record reopened; and directed that a further hearing be held before Administrative Law Judge Socoloff for the purpose of taking evidence with respect to the allegations of the consolidated complaints (Pet. App. D, pp. A-14-A-17).

Believing that the September 16, 1977, order of the Board, directing a relitigation of events finally and completely litigated, was and is a final order within the meaning of Section 10(f) of the National Labor Relations Act, as amended, 29 USC § 160(f), and that the decision of the Court of Appeals in the contempt proceedings foreclosed further litigation of the matters alleged in the complaints, the company petitioned the Court of Appeals to review the Board's order of September 16, 1977, and to stay further litigation of these matters before the National Labor Relations Board (Pet. App. C, pp. A-4-A-13).

C. **Action of the Court of Appeals.**

In the Court of Appeals, the National Labor Relations Board moved to dismiss the petitioners' petition for review, and to deny the stay requested by the petitioners of the unfair labor practice proceeding, but requested the Court to issue an order clarifying its decision in the contempt action. The International Ladies' Garment Workers' Union was permitted by the Court of Appeals to intervene. After having considered the briefs submitted by the petitioners and the Board, the Court of Appeals denied all requested relief because:

> "Upon consideration of the motions and supporting memoranda of the parties, it is the conclusion of the Court that

> the September 16, 1977, order of the Board is not a final order within the meaning of Section 10(f) of the National Labor Relations Act, 29 USC § 160 (f). The Court further finds that upon the conclusion of the administrative hearing and the issuance of the proper order by the Board, the petitioners, if still aggrieved, will be able to seek review in this Court.
>
> "IT IS THEREFORE ORDERED that the petition for review be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the motion for a stay be, and it hereby is, denied and IT IS HEREBY ORDERED that the motion for an order of clarification be, and it hereby is, denied."
>
> (Pet. App. A, pp. A-1-A-2).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals below not only conflicts with the decisions of other Courts of Appeal on the character of the September 16, 1977, order of the Board as not being a "final order", within the meaning of Section 10(f) of the National Labor Relations Act, as amended, 29 USC § 160(f). If left standing, the decision of the Court of Appeals also effectively subverts the doctrines of res judicata and collateral estoppel applied to Labor Board proceedings as enunciated by this Court. Thus, the Court of Appeals has approved an order of the National Labor Relations Board which forces the petitioners to relitigate, at considerable expense in both time, effort, and money, events which have been fully and completely litigated to finality, as we will point out.

A. The Court of Appeals Erred in Concluding That the September 16, 1977, Order of the Board Was Not a "Final Order" Within the Meaning of Section 10(f) of the Act.

As we have seen, the Board by its September 16, 1977, order directed that the company relitigate matters fully and finally determined by the Court of Appeals in its May 23, 1975, order entered in *NLRB v. Decaturville Sportswear Co., Inc.*, 518 F.2d 788, *cert. denied*, 423 U.S. 913 (1975). The Court of Appeals had previously observed that "the appropriate method of review of the Board's orders in connection with the case pending before it is by petition to review filed in the United States Court of Appeals." *Sears, Roebuck & Co. v. National Labor Relations Board*, 433 F.2d 210, 211 (6th Cir. 1970). This is exactly the procedure taken by the petitioners here. Unlike *Myers v. Bethlehem Ship Building Corp.*, 303 U.S. 41, 48 (1938), or *Thompson Products v. NLRB*, 133 F. 2d 637, 640 (6th Cir. 1943), the posture of the instant litigation is completely different from the "mere issuance of a complaint and giving notice

of a hearing thereon". Here, the very facts on which the Board seeks to conduct a subsequent hearing have been fully and completely litigated by the Board in the Court of Appeals, both before the Special Master and before the Court itself. Had the Board adopted the recommended order of its Administrative Law Judge and dismissed the complaint in its entirety, that decision would clearly have been reviewable by the union in the Court of Appeals or in this Court by certiorari. *International Union v. Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335 (1945). The September 16, 1977, order of the Board directing a hearing on matters fully, completely, and finally litigated before the Court of Appeals certainly is a "final order" so far as the petitioners are concerned. There is no effective way that the petitioners can escape relitigation of the events ordered by the Board in its September 16, 1977, order other than to capitulate. We submit that the Court of Appeals' characterization of the September 16, 1977, order conflicts with decisions of other Courts of Appeals on this question. In *Waterway Terminals Co. v. NLRB*, 467 F.2d 1011 (9th Cir. 1972), the Court of Appeals granted review under Section 10(f) of the Act of a decision and order of the Board quashing a notice of hearing issued at the conclusion of a hearing under Section 10(k) of the Act. Construing Section 10(k) with its corollary, Section 8(b)(4)(B), the Court observed:

> "To deny review of a refusal to proceed to award under a Section 10(k) proceeding is to nullify the effectiveness of Section 8(b)(4)(B). The only avenue to relief from a dispute under that Section is by way of a Section 10(k) proceeding. An order quashing a notice of hearing under Section 10(k) therefore constitutes a 'final order' as to the underlying charge based on Section 8(b)(4)(B)."
>
> 467 F.2d at 1016.

In like manner, the Court of Appeals for the District of Columbia in *ILGWU Local 415-475 v. NLRB*, 501 F.2d 823 (DC

Cir. 1974), reviewed under Section 10(f) of the Act the withdrawal of a complaint as a part of an informal settlement agreement by the General Counsel and concluded that such an agreement does "constitute a final order of the Board reviewable by this Court under Section 10(f)." 501 F.2d at 826.

Similarly, the Court of Appeals for the Third Circuit in *Leeds & Northrop Co. v. NLRB*, 357 F.2d 527 (3rd Cir. 1966), reviewed, over the objection of the Board, the denial by a Board Regional Director, affirmed by the Board's General Counsel, of the refusal to grant an employer an evidentiary hearing on its objection to an informal settlement agreement with the Regional Director and the union charged with committing an unfair labor practice after the complaint had been withdrawn. Clearly, *Waterway Terminals Co., ILGWU Local 415*, and *Leeds & Northrop Co.*, all indicate that the September 16, 1977, order of the National Labor Relations Board was a "final order" within the meaning of Section 10(f) of the Act. By denying review of the September 16, 1977, order of the Board, the Court of Appeals has nullified the effectiveness of the legal doctrines of res judicata and collateral estoppel, as we shall point out, and has stultified the effect of its own decree entered May 23, 1975, in the contempt action. Thus, the order of March 30, 1978, of the Court of Appeals refusing to review the action of the Board on the ground that it was not a "final order" within the meaning of Section 10(f) of the Act, is erroneous and in conflict with the other decisions of the Courts of Appeals which have decided similar issues. To remove the conflict between the order of the Court of Appeals of March 30, 1978, with the other decisions of Courts of Appeal on the character of orders reviewable under Section 10(f) of the Act, as well as to avoid the injustice to the petitioners of being forced to litigate, at great time, expense, and effort, in a ten-week trial, events fully and finally determined adversely to the Board, the Court should grant the petition.

B. The Court of Appeals Erred in Concluding That the Doctrines of Res Judicata and Collateral Estoppel Do Not Preclude Subsequent Relitigation of Events as Directed by the Board's Order of September 16, 1977.

The central question to be determined is whether the employees, whom the Board alleges to be unfair labor practice strikers in the complaints issued following this Court's denial of the Board's petition for certiorari on October 20, 1975, 423 U.S. 913 (1975), have a right to immediate reinstatement on their unconditional offer to return to work at petitioners' plants. This question was finally and completely adjudicated in the contempt proceeding and is clearly res judicata as between the parties now. Hence, Administrative Law Judge Socoloff was correct in his determination that the doctrines of res judicata and collateral estoppel barred the Board from attempting to relitigate these matters again (Pet. App. E, pp. A-28-A-29). A cursory reading of the complaint issued June 29, 1976 (Pet. App. G, pp. A-94-A-105) will clearly confirm the correctness of the analysis of the Administrative Law Judge and the error of the Board in ordering a further hearing and the Court of Appeals in sanctioning it. Paragraph 7 of that Complaint alleges that a number of pressers at Decaturville engaged in a strike. Paragraph 8 of the complaint alleges that on or about June 23, those individuals were discharged. In paragraph 9, the petitioners are accused of having refused reinstatement to these employees because of their having participated in a strike. The same substantive allegations were made in the Board's petition for contempt filed September 21, 1971, in the Court of Appeals for the Sixth Circuit. The Special Master considered all of these allegations and concluded:

> "12. The remaining pressers were not justified in their demand that Rushing be reinstated or rehired by plant manager Anderson on June 23, 1970, before they would return to work. These pressers were not discharged by the

company unreasonably under the circumstances, despite anti-union sentiment on the part of the company.

"13. If, however, the company acted improperly, unlawfully, or unreasonably in discharging the pressers, other than Nelson Rushing, on June 23, 1970, for engaging in a concerted work stoppage, they should not now in equity be entitled to reinstatement since the company offered to them full reinstatement on June 24, 1970, by letter which most chose to ignore or decline. The offer of the company was a bona fide effort to reinstate. If accepted, the pressers on strike would not have sustained an diminution of seniority, earnings, or any other privileges which they enjoyed prior to their termination."

(Pet. App. F, p. A-6).

In the Court of Appeals, these findings and conclusions were adopted, without modification, because:

"A review of the record in this case, including the exceptions to the Special Master's report, and the briefs filed in support of those exceptions fails to convince this Court that the Special Master's findings, which were based on two years of fact finding were clearly erroneous. * * *"

518 F. 2d at 790.

This Court declined to review the approval by the Court of Appeals for the Sixth Circuit of the Special Master's findings. 423 U.S. 913 (1975).

The corollary question which the complaints issued after the conclusion of the contempt proceeding raise is the right of sympathy strikers at the other plants of the petitioners, in addition to Decaturville, for immediate reinstatement on their unconditional offer to return to work. Again, this issue has been finally and conclusively determined. The Board's original petition for contempt dealt with the same question and specified the names of two employees at Decaturville, Judy Scott Maness and Peggy Cagle, three employees at Loris, Bryce Todd, Robert Stephens, and Robert Richardson, and two employees at Frisco City, Randy Montgomery and Sandra Matchett, whom the Board alleged to have abandoned the strike and sought reinstatement. Again, this issue was fully litigated and resolved by the Special Master:

"7. There is insufficient clear and convincing proof establishing that picketing at the Loris plant was solely to protest an unfair labor practice. Both Todd and Stephens who joined the picket line admitted they walked out of the plant, without notice to the company, and without making any effort to advise management of the nature of their grievances, if any. All 'concerted activity' is not protected by Section 7 of the National Labor Relations Act (citing cases). Todd and Stephens joined the pickets in front of the company's plant in Loris in an effort to get a union into the plant, as well as to protest what they considered an unfair or unjust practice. They assumed a status of economic strikers who might be subject to permanent replacement under certain conditions (citing cases) . . ."

(Pet. App. F, p. A-82)

These two incidents clearly indicate that the issues which the Board seeks to relitigate have been clearly, finally, and conclusively adjudicated and are no longer open for further litigation.

The Court of Appeals erred in not concluding that the doctrines of res judicata and collateral estoppel, as enunciated by this Court, preclude the Board from proceeding further on the same issues. In *Commissioner v. Sunnen*, 333 U.S. 593 (1948), the Court elaborately set forth the philosophy and provisions of the rule of res judicata as it applied to successive litigation of the same issue. Relying upon the decision of *Cromwell v. Sac County*, 94 U.S. 351 (1877), the Court said:

"The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose'. *Cromwell v. Sac County*, 94 U.S. 351, 352, 24 L.Ed. 195, 197. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties or any ground whatever, absent fraud or some other factor invalidating the judgment."

333 U.S. at 597.

Subsequently, the Court held:

> "Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421 (1966)."

Applying the doctrines of res judicata and its corollary, collateral estoppel, to the events here, it is clear that the doctrines of res judicata and collateral estoppel, as enunciated by this Court, bar the subsequent proceeding ordered by the Board in its September 16, 1977, order. The fact that the first proceeding was a contempt action instituted by the Board itself in a Court of Appeals and the second is an unfair labor practice proceeding

before an Administrative Law Judge of the Board, is of no consequence. The parties are the same. This Court said in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 387 (1940):

> "Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessary fatal. * * * 'Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties nominally different may be, in legal effect, the same. A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them . . . There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in litigation of the same issue between that party and another officer of the government . . . The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy."

310 U.S. at 402, 403.

There can be no question but that the Board is again attempting to relitigate the character and nature of the work stoppage at Decaturville in the unfair labor practice proceeding and to seek a contrary finding regarding the rights of picketing employees and sympathy strikers to reinstatement. Before the Court of Appeals in *NLRB v. Decaturville Sportswear Co., Inc.*, 518 F.2d 788, *cert. denied*, 423 U.S. 913 (1975), the Board conceded that it accepted the findings of fact of the Special Master. Having made that concession, what remains to litigate? Had the Board prevailed in its contempt action against the petitioners in the Court of Appeals, it is certainly not doubtful that the names of all the people listed in the various complaints involved here (Pet. App. e.g. G, pp. A-94-A-105), would have been presented at some compliance stage of the contempt proceeding

as individuals entitled to reinstatement. Yet, having lost on the cardinal issue in the case, the Board now attempts to relitigate the matter on the asserted ground that a different standard of proof would have produced a different result. Having accepted the facts as found by the Special Master, the Board is hardly in a position to complain about the standard of proof imposed. Especially is this true since the Board itself initiated the contempt action and thereby chose the initial forum to litigate the issue. The Administrative Law Judge, analyzing the effect of the decision in the contempt action, and comparing it to the allegations of the complaint (Pet. App. G, pp. A-94-A-105, J, pp. A-120-A-127) observed:

> "The Court's decisions are the law of the case. The Court has determined that:
>
> "(1) Rushing was discharged for cause;
>
> "(2) The Decaturville employees who protested the Rushing discharge were engaged in unprotected activity, and, thus, were themselves lawfully discharged;
>
> "(3) The strikers at others of Respondents' plants were not engaged in protected activity;
>
> "(4) The rights of the sympathy strikers at the Russell plant are dependent upon the protected nature of the strikes at Respondents' other plants.
>
> "(5) The strikes at said other plants were unprotected activity.
>
> "I conclude, for the reasons stated below, that the findings and conclusions of the Court in the *Decaturville* case must be accorded a *res judicata* or *collateral estoppel* effect in this case before the Board, and that the General Counsel may not now relitigate the very issues previously litigated in that case."
>
> (Pet. App. E, pp. A-23-A-24)

Since Courts of Appeal have consistently applied the doctrines of res judicata and collateral estoppel where previous Board determinations or district court decisions have affected subsequent proceedings before the Board, i.e. ***NLRB v. Brown & Root***, 203 F.2d 239 (8th Cir. 1953); *Zdanok v. Glidden Company*, 327 F.2d 944 (2d Cir. 1964); ***NLRB v. Walter E. Heyman***, 541 F.2d 796 (9th Cir. 1976); *Eazor Express, Inc. v. General Teamsters Local 326*, 388 F.Supp. 1264 (D. Del. 1975), we know of no reason why the same consideration should not apply where the Board has instituted an action in the Court of Appeals and following an adverse result, attempts to present the same claims before its Administrative Law Judge.

Every individual whose name appears in the complaint involved in the unfair labor practice proceeding (Pet. App. G, H,I,J,K, pp. A-94, A-136) stands on exactly the same footing as Judy Scott Maness, Peggy Cagle, Bryce Todd, Robert Stephens, Robert Richardson, Sandra Matchett, and Randy Montgomery, all of whom were considered by the Court of Appeals and found not to be entitled to reinstatement because they were not unfair labor practice strikers. A contrary position would produce ludicrous results. Employees who were alleged by the Board to have been denied immediate reinstatement in the contempt action have had their rights finally adjudicated, adversely to them. Yet, the Board with approval of the Court of Appeals now is permitted to seek reinstatement and backpay for the employees listed in the complaint issued after this Court denied the Board's petition for certiorari on a legal proposition that is squarely "on all fours" with that which the Court of Appeals determined in the contempt action.

It is estimated that a trial of these consolidated complaints would consume ten weeks (Pet. App. C, p. A-11). Over four thousand pages of testimony were considered by the Court of Appeals in the contempt action. This Court has said:

> "Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. The party adverse to the administrative body is entitled to rely on the conclusiveness of the decree entered by a court to the same extent that other litigants may rely on judgments for or against them."
>
> *International Union v. Eagle-Picher Mining and Smelting Co.*, 325 U.S. 336, 340 (1945).

To permit further litigation, as the Court of Appeals has done, destroys finality of judgments; undercuts the doctrines of res judicata and collateral estoppel: and forces the petitioners to expend time, effort and money for which there is no hope of recoupment, even if successful.

CONCLUSION

The petition for a writ of certiorari should be granted.

June, 1978

Respectfully submitted,

W. OVID COLLINS, JR.
CHARLES HAMPTON WHITE
Third National Bank Building
Nashville, Tennessee 37219

APPENDIX

APPENDIX A

United States Court of Appeals
for the Sixth Circuit

Decaturville Sportswear Co., Inc., et al., Petitioners, v. National Labor Relations Board, Respondent.	}	Nos. 78-1005, 18064, 18154, 18249, 18250 and 18256.

ORDER

(Filed March 30, 1978)

Before: Celebrezze, Peck and Lively, Circuit Judges

This cause is before the Court on a petition to review and stay an order of the respondent Board entered September 16, 1977, directing a reopening of the record and the scheduling of a further administrative hearing on an unfair labor practice complaint lodged against the petitioning companies, and upon the motions of the respondent to dismiss the petition to review, deny the stay, and to issue an order clarifying its opinion in *N.L.R.B. v. Decaturville Sportswear Co., Inc.*, 518 F.2d 788 (6th Cir.), cert. denied 423 U.S. 913 (1975). Petitioners have also filed a request for oral argument and their brief in support of their petition.

Petitioners have taken the position that the issues in the upcoming hearing on the unfair labor practices question have already been disposed of by the application of the doctrines of

res judicata and collateral estoppel to the holding of this Court in the case cited above, wherein we found Decaturville not to be in contempt of the prior order of this Court in *Decaturville Sportswear Co., Inc. v. N.L.R.B.*, 406 F.2d 886 (6th Cir. 1969).

Upon consideration of the motions and supporting memoranda of the parties, it is the conclusion of the Court that the September 16, 1977 order of the Board is not a final order within the meaning of § 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f). The Court further finds that upon the conclusion of the administrative hearing and the issuance of a proper order by the Board, the petitioners, if still aggrieved, will be able to seek review in this Court.

It is therefore ORDERED that the petition for review be, and it hereby is, dismissed. It is further ORDERED that the motion for a stay be, and it hereby is, denied and it is ORDERED that the motion for an order of clarification be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX B

Office of the Clerk

United States Court of Appeals
For the Sixth Circuit

Cincinnati, Ohio 45202

Decaturville Sportswear Co., Inc., et al.
vs.
National Labor Relations Board.
No. 78-1005

Dear Counsel:

Please be advised that pursuant to Rule 41(a), Federal Rules of Appellate Procedure, this Court's mandate has today issued in the above entitled case.

Costs in the amount of $ -0- have been taxed against the appellant appellee.

Dated May 15, 1978.

Very truly yours,

JOHN P. HEHMAN, Clerk

APPENDIX C

United States Court of Appeals for the Sixth Circuit

Decaturville Sportswear Co., Inc., et al., Petitioners, v. National Labor Relations Board, Respondent.	Nos. 18,064, 18,249, 18,250, 18,256, and 18,154

PETITION TO REVIEW ORDER OF NATIONAL LABOR RELATIONS BOARD AND TO STAY UNFAIR LABOR PRACTICE HEARING ORDERED THEREBY

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

The petitioners, Decaturville Sportswear Co., Inc., Marlene Industries Corporation, Trousdale Manufacturing Co., Inc., Westmoreland Manufacturing Corp., Aynor Manufacturing Co., Inc., and Loris Manufacturing Co., Inc. [subsequently referred to as the "company"] respectfully petition this Court to review, vacate, and set aside, pursuant to the provisions of Section 10(f) of the National Labor Relations Act, as amended, 29 USC § 160(f), the order of the National Labor Relations Board, entered September 17, 1977, known on the records of the National Labor Relations Board as Marlene Industries Corporation, Cases No. 26-CA-3642, et al., on the basis that the order of the National Labor Relations Board is repugnant to and stultifies the terms and provisions of the decision of this Court entered May 23, 1975, in this proceeding. Additionally, the petitioners would show that the order of the National Labor Relations Board, a photocopy of which is attached hereto and

made a part hereof as Exhibit "A", if permitted, will force the company to litigate exactly the same matters a second time which have already been considered by this Court in this proceeding, thereby depriving the company of its property without due process of law, in contravention of the provisions of the Fifth Amendment to the Constitution of the United States. The company thus alleges it is aggrieved by the order of the Board.

In support of this petition, the company alleges as follows:

I. On September 21, 1971, the Board filed a petition seeking to have the company cited for contempt for failing to abide by the terms and provisions of a decree of this Court entered in the case of *Decaturville Sportswear Co., Inc. v. NLRB*, 406 F.2d 886 (6th Cir. 1969). This Court appointed the Hon. Harry W. Wellford, United States District Judge, as Special Master to hear the evidence concerning the allegations set forth in the Board's petition.

II. On June 29, 1972, the National Labor Relations Board issued its decision in *Russell Sportswear Corporation*, 197 NLRB 1116 (1972). This Court on May 13, 1973, denied enforcement of this order of the Board and remanded the proceeding to the Board for further consideration to determine the rights, if any, of employees striking against Russell Sportswear Corporation, Russell Springs, Kentucky, as sympathy strikers with the Decaturville, Tennessee, employees. *NLRB v. Russell Sportswear Corporation*, — F.2d —, 83 LRRM 2225 (1973).

III. On September 21, 1973, the Board notified all parties that it had decided to accept the remand of this Court in *Russell Sportswear Corporation*, and would take the action it deemed appropriate.

IV. On October 5, 1973, and on June 12, 1974, the Hon. Harry W. Wellford, Special Master, appointed by this Court

to hear the evidence concerning the allegations of contempt against the company, filed his memorandum of law setting forth his conclusion that the strike which began at the plant of Decaturville Sportswear Co., Inc., Decaturville, Tennessee, in June of 1970, was not a protected activity and, therefore, the employees of the company who engaged in sympathy strikes at the plants of Trousdale Manufacturing Co., Inc., Westmoreland Manufacturing Corp., Loris Manufacturing Co., Inc., and Aynor Manufacturing Co., Inc., were not engaged in protected activities. On May 23, 1975, this Court adopted the findings, conclusions, and recommendations of Judge Wellford. *NLRB v. Decaturville Sportswear Co., Inc.*, 518 F.2d 788 (6th Cir. 1975).

V. On October 20, 1975, the Supreme Court of the United States denied the Board's petition for certiorari to review the decision of this Court. 423 U.S. 913 (1975).

VI. On March 18, 1976, the Board issued its order reopening the record in *Russell Sportswear Corporation, supra*, and remanded the proceeding to the Regional Director for Region 9 at Cincinnati, Ohio, for a hearing.

VII. On June 29, 1976, the Regional Director for Region 26 of the National Labor Relations Board issued a complaint in Cases Nos. 26-CA-3642, 3646, 3828, 5111, 5112, 5113, 5336-1, 5336-2, and 5355, against Decaturville Sportswear Co., Inc., Trousdale Manufacturing Co., Inc., and Westmoreland Manufacturing Corp., all located in Tennessee.

VIII. On July 13, 1976, John S. Irving, Esq., General Counsel of the Board, issued an order consolidating for trial the complaints issued by the Regional Director for the 9th, 15th, and 26th Regions against the company.

IX. On August 17, 1976, the Regional Director for Region 11 at Winston-Salem, North Carolina, issued a complaint in

Case No. 11-CA-5748 and 5749 against Loris Manufacturing Co., Inc., and Aynor Manufacturing Co., Inc., both located in South Carolina.

X. On September 8, 1976, the Regional Director for Region 9 of the NLRB issued an additional complaint in Case No. 9-CA-8610 and 9-CA-8888 against Russell Sportswear Corporation, Russell Springs, Kentucky.

XI. A hearing was held at Decaturville, Tennessee, on September 28, 1976, before Administrative Law Judge Irwin H. Socoloff, who directed the parties to file statements with respect to the validity of the answer of the company raising the issues of res judicata and collateral estoppel and the finality of this Court's decision of May 23, 1975, as a total and complete bar to the unfair labor practice proceeding.

XII. On April 7, 1977, Administrative Law Judge Socoloff issued his decision, a photocopy of which is attached as Exhibit "B" to this petition, in which he concluded "the allegations of the complaints herein, charging violations by respondents of Section 8(a)(3) and (1) of the Act, are barred under the applicable *res judicata* and *collateral estoppel* principles." A comparison of the allegations of the Board's petition for contempt filde in this Court in September, 1971, as amended, with the allegations of the complaints in the instant proceeding, clearly reveals that the cardinal issue of the entire controversy is the character of the strike which began at Decaturville in June, 1970. All of the allegations of the complaints involving Russell Sportswear Corporation, M. Hoffman & Co., Inc., Landlubber Alabama, Inc., and other Marlene Industries Corporation subsidiaries, are entirely derivative and presuppose the existence of an unfair labor practice strike which began at Decaturville, Tennessee, in June, 1970.

XIII. On September 17, 1977, the National Labor Relations Board issued the instant order in which it construed the signifi-

cance of this Court's decision in *NLRB v. Decaturville Sportswear Co., Inc.*, 518 F.2d 788 (6th Cir. 1975), *cert. denied*, 423 U. S. 913 (1976), and concluded: "Under relevant principles of law as enunciated in numerous decisions the doctrines of *res judicata* and *collateral estoppel* are not applicable where the standard of proof has been higher in the first action than in the second. Thus a contempt proceeding, such as the *Decaturville* decision, which involves an application of the 'clear and convincing evidence' standard, cannot bar a subsequent unfair labor practice proceeding involving a different cause of action, different parties, and 'a preponderance of the evidence' burden of proof." [Exhibit "A", page 2].

XIV. The company alleges that the order of the Board of September 17, 1977, conflicts with the order of this Court of May 23, 1975, because it forces the company to relitigate events which have already been completely and finally adjudicated in the contempt action culminating in this Court's order of May 23, 1975. To force the company to relitigate these facts or their derivative events as required by the September 17, 1977, Board order, violates the doctrines of res judicata and collateral estoppel and deprives the company of its property without due process of law. In support of this allegation, the company alleges further:

A. The complaint issued June 29, 1976, in Case No. 26-CA-3642, et al., alleges:

"7

"On or about June 23, 1970, the below-named employees, all of whom were employed in the pressing department of respondent Decaturville at its Decaturville, Tennessee, plant, did engage in a strike (list of names)

"8

Respondent Decaturville, on or about June 23, 1970, at its Decaturville, Tennessee, plant, discharged those employees referred to in Paragraph 7 above.

"9

"Respondent Decaturville discharged those employees referred to in Paragraph 7 above as alleged in Paragraph 8 above and thereafter failed and refused to reinstate or recall said employees, because said employees engaged in the strike referred to in Paragraph 7 above or because said employees engaged in other activities protected by Section 7 of the Act."

These allegations are identical to those considered by the Special Master in the contempt litigation and affirmed by this Court as follows:

"On June 23, 1970, Nelson Rushing, an employee in the pressing department of the Decaturville, Tennessee, plant, was discharged. The Master concluded that he was discharged because of insubordination. The Board contends that Rushing's union proclivities were at least part of the reason for Rushing's discharge.

"Rushing's discharge prompted a walk-out of approximately 50 fellow pressers. These employees were then discharged. However, the company sent each a letter the following day offering full reinstatement. The Special Master concluded that the pressers were not justified in demanding that Rushing be reinstated and therefore their discharge was also not improper. The Special Master noted that in light of the reinstatement offer equity would not dictate reinstatement even if the employees had been unreasonably discharged. The company's refusal to hire certain applicants or to rehire or reinstate various other striking employees was also found proper by the Special Master."

518 F.2d at 790.

Thus, the company alleges that the very issue ordered by the Board by its September 17, 1977, order to be litigated has already been fully and finally determined by this Court. Under

the principles of res judicata and collateral estoppel, this issue is not open for further litigation.

B. With respect to the reinstatement rights of the employees who went on strike in sympathy with the pickets at Decaturville, the complaint in Case No. 26-CA-3642 further alleges:

"15.

"On or about April 19, 1974, the below-named employees of respondent Trousdale, and other employees of respondent Trousdale, who participated in the strike described in Paragraph 10, made unconditional offers to respondent Trousdale to return to their former or substantially equivalent positions of employment: (list of names)

"16.

"Respondent Decaturville, Westmoreland, and Trousdale, failed and refused, and continue to fail and refuse, to reinstate their employees referred to in Paragraphs 13, 14, and 15 above, to their former or substantially equivalent positions of employment."

In passing on this allegation and other similar allegations respecting other plants of the company, the Administrative Law Judge construed this Court's decision of May 23, 1975, as the law of the case and determined that this Court decided:

"2. The Decaturville employees who protested the Rushing discharge were engaged in unprotected activity and, thus, were themselves lawfully discharged.

"3. The strikers at others of respondents' plants were not engaged in protected activities.

"4. The rights of the sympathy strikers at the Russell plant are dependent upon the protected nature of the strikes at respondents' other plants.

"5. The strikes at said other plants were unprotected activities." [Exhibit "B", page 5].

Again, the company alleges that the September 17, 1977, order of the Board will force the company to relitigate again entirely these questions which have been fully and finally resolved by this Court by its May 23, 1975, order.

C. The company further alleges that if it is forced to relitigate the issues raised by the complaints, as directed by the September 17, 1977, order of the Board, inconsistent results may follow which will effectively stultify or contradict the force of this Court's order of May 23, 1975. Thus, the company alleges that if it is forced to retry the validity of its discharge of pressers at Decaturville, Tennessee, in 1970, a subsequent proceeding might well result in an order of the Board directing the company to reinstate, with backpay, all pressers whom it discharged where this Court has sanctioned and approved the company's action in discharging them. In like manner, a subsequent relitigation of the reinstatement rights of picketing employees at all plants might well result in a decision of the Board that they were unfair labor practice strikers, entitled to immediate reinstatement and backpay, whereas this Court has held that they were engaged in unprotected activities and not entitled to the benefits of Section 7 of the National Labor Relations Act.

D. Additionally, the company alleges that the General Counsel of the Board estimates that the proceeding ordered by the September 17, 1977, order of the Board will require at least ten weeks' trial in four different states and even if successful, there is no effective way that the company can recoup the time and financial resources expended in defense of these allegations. Thus, the company alleges that to permit a relitigation of issues fully determined and resolved by this Court in this case, as ordered by the Board in its September 17, 1977, order, deprives it of its property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States. Finally, the company alleges that to per-

mit relitigation of these issues where the Board accepted, without objection, the findings of fact of this Court's Special Master, violates the doctrines of res judicata and collateral estoppel and effectively undercuts and stultifies the judgment of this Court.

E. Trial of this proceeding is scheduled to commence at Decaturville, Tennessee, on February 6, 1978, and unless this Court stays the proceeding until it can fully review the record, the company, having no other legal remedy available, will be deprived of its property without due process of law.

WHEREFORE, the petitioners respectfully pray as follows:

1. That the Clerk issue an order requiring the Board to file with the Clerk of this Court a record of the proceedings before it in Case No. 26-CA-3642, et al., and respond to the allegations of this petition.

2. That the Court issue an order staying any proceeding ordered by the National Labor Relations Board, its agents, officers, servants, or employees, in Case No. 26-CA-3642, et al., pending a determination by this Court of the validity of the September 17, 1977, order as set forth in this petition.

3. That this Court, after due notice of hearing, enter an order vacating, setting aside, or voiding the September 17, 1977, order of the National Labor Relations Board in this case and directing the National Labor Relations Board to conduct no further proceedings on the issues involved in this matter.

4. That the Court take such other and further action and grant such other and further relief as may be deemed reasonable and proper to secure compliance with this Court's judgment of May 23, 1975, to the end that petitioners will not be deprived of their property without due process of law or forced to twice litigate facts, situations, episodes and events, completely and fully adjudicated by this Court.

Dated at Nashville, Tennessee, this 29th day of December, 1977.

/s/ CHARLES HAMPTON WHITE
Eighteenth Floor
Third National Bank Building
Nashville, Tennessee 37219
Attorney for the Petitioners

Certificate of Service

I, Charles Hampton White, certify that I am the attorney for the petitioners and that I have this day caused a copy of the foregoing petition to be served upon Elliott Moore, Esq., Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N. W., Washington, D. C. 20570, by depositing a copy thereof in the United States Mail, postage prepaid, addressed to Elliott Moore, Esq., at the above address which is the last address of such person known to me.

This 29th day of December, 1977.

/s/ CHARLES HAMPTON WHITE

APPENDIX D

Exhibit "A"

Not Included in Bound Volumes

FJM
Decaturville, Tenn.

United States of America
Before the National Labor Relations Board

Marlene Industries Corporation; Decaturville Sportswear Co., Inc.; Westmoreland Manufacturing Corporation; Trousdale Manufacturing Company, Inc.	Cases 26-CA-3642 26-CA-3846 26-CA-3828 26-CA-5111 26-CA-5112 26-CA-5113 26-CA-5336(1) 26-CA-5336(2) 26-CA-5355
and	
Marlene Industries Corporation; Frisco City Sportswear, Inc.; M. Hoffman & Company, Inc.; and Landlubber Alabama, Inc.	Case 15-CA-4834
and	
Russell Sportswear Corporation	Cases 9-CA-6384 9-CA-8610 9-CA-8888
and	
Marlene Industries Corporation; Aynor Manufacturing Company, Inc.: Loris Manufacturing Company, Inc.	Cases 11-CA-5748 11-CA-5749
and	
International Ladies' Garment Workers' Union, AFL-CIO	

ORDER REOPENING RECORD AND REMANDING PROCEEDINGS TO REGIONAL DIRECTOR

On April 7, 1977, Administrative Law Judge Irwin H. Socoloff issued his Decision in this proceeding recommending that the consolidated complaint be dismissed in its entirety. In so doing, the Administrative Law Judge concluded that the findings and conclusions of the United States Court of Appeals for the Sixth Circuit in *N.L.R.B. v. Decaturville Sportswear Co., Inc.*, 518 F. 2d (1975); *cert. den.* 423 U. S. 913 (1976) must be accorded a *res judicata* or *collateral estoppel* effect in the instant case. In support of this conclusion the Administrative Law Judge noted that in passing on the legal status of employees who struck the Decaturville plant in 1970, the Court of Appeals held, *inter alia*, that Decaturville's discharge of strikers and its refusal to rehire or reinstate strikers was not improper and was not a basis for a finding of civil contempt against the Company. Inasmuch as the rights of sympathy strikers at Russell and at various other Marlene Industries plants are central to the instant litigation and are dependent upon the nature of the strike at the Decaturville plant, and because he concluded that the *Decaturville* decision definitely resolved the nature of the Decaturville strike, the Administrative Law Judge reasoned that any further litigation of the allegations of the instant complaint is barred.

Thereafter, the General Counsel and the Charging Party filed exceptions to the Administrative Law Judge's Decision and briefs in support of their exceptions. Respondent filed a brief in support of the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in this proceeding to a three-member panel.

In their exceptions and supporting briefs the General Counsel and the Charging Party[1] urge, *inter alia*, that the Administrative

[1] On June 16, 1977, the Charging Party filed a Motion for Oral Argument. In view of our decision to remand these proceedings oral

Law Judge's application of the principles of *res judicata* and *collateral estoppel* to the facts of the instant litigation is erroneous. We find merit in this position. The Court of Appeals emphasized in its *Decaturville* decision that a very different and more demanding burden of proof is required in a contempt proceeding than in a normal proceeding for the enforcement of a Board order. See 518 F. 2d at 790. Thus in *Decaturville*, a contempt proceeding, the Court of Appeals applied a strict evidentiary standard of "clear and convincing evidence" in holding that the Board had failed to demonstrate that Respondent's conduct, *vis a vis* its striking employees, constituted grounds for a finding of civil contempt. Under relevant principles of law as enunciated in numerous decisions[2] the doctrines of *res judicata* or *collateral estoppel* are not applicable where the standard of proof has been higher in the first action than in the second. Thus a contempt proceeding, such as the *Decaturville* decision, which involves an application of the "clear and convincing evidence" standard, cannot bar a subsequent unfair labor practice proceeding involving a different cause of action, different parties, and a "preponderance of the evidence" burden of proof.

Accordingly, the Board having duly considered the matter,

It Is Hereby Ordered that the record in the proceeding be, and it hereby is, reopened and that a further hearing be held before Administrative Law Judge Irwin H. Socoloff for the purpose of taking evidence in accordance with the remand of the United States Court of Appeals for the Sixth Circuit on July 17, 1973, and the Board's Order Reopening Record and Remanding dated March 18, 1976.

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argument is not warranted at this time and said Motion is hereby denied.

[2] The General Counsel and the Charging Party rely on *Helvering v. Mitchell*, 303 U.S. 391, and *Neaderland v. Commissioner of Internal Revenue*, 424 F. 2d 639 (C.A. 2, 1970) among other cases.

It Is Further Ordered that this proceeding be remanded to the Regional Director for Region 26 for the purpose of arranging such further hearing, and that said Regional Director be, and he hereby is, authorized to issue notice thereof.

It Is Further Ordered that upon conclusion of such further hearing, the Administrative Law Judge shall prepare and serve upon the parties a Supplemental Decision setting forth the resolution of any necessary credibility issues, and his findings, conclusions, and recommendations with respect to the allegations of the consolidated complaint. Copies of such Supplemental Decision shall be served on all the parties after which the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

Dated, Washington, D.C., September 16, 1977.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

(Seal) National Labor Relations Board

APPENDIX E

Exhibit "B"

JD-231-77
Decaturville, TN

United States of America
Before the National Labor Relations Board

Division of Judges

Marlene Industries Corporation;	Cases 26-CA-3642
Decaturville Sportswear Co., Inc.;	26-CA-3646
Westmoreland Manufacturing Corporation;	26-CA-3828
	26-CA-5111
Trousdale Manufacturing Company, Inc.,	26-CA-5112
	26-CA-5113
	26-CA-5336(1)
and	26-CA-5336(2)
	26-CA-5355
Marlene Industries Corporation; Frisco City Sportswear, Inc.; M. Hoffman & Company, Inc.; and Landlubber Alabama, Inc.,	Case 15-CA-4834
and	
Russell Sportswear Corporation	Cases 9-CA-6384
	9-CA-8610
and	9-CA-8888
Marlene Industries Corporation; Aynor Manufacturing Company, Inc.; Loris Manufacturing Company, Inc.,	Cases 11-CA-5748
	11-CA-5749
and	
International Ladies Garment Workers' Union, AFL-CIO.	

Robert G. Levy II, Esq., Houston, TX, for the General Counsel.

James R. Goldberg, Esq., Atlanta, GA, for the Charging Party.

Charles H. White, Esq., Nashville, TN, for the Respondent.

DECISION

IRWIN H. SOCOLOFF, Administrative Law Judge: Marlene Industries Corporation, herein called Marlene, its wholly owned subsidiary manufacturing plants, and certain alleged successors, Respondents herein, are engaged in the manufacture and sale of wearing apparel. Respondents, and each of them, are employers engaged in commerce within the meaning of the Act, and meet the Board's standards for assertion of jurisdiction. International Ladies' Garment Workers' Union, AFL-CIO, herein called the Union, is a labor organization within the meaning of the Act.

The Complaints in this consolidated proceeding allege violations by the Respondents of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act. Those allegations are denied by Respondents in their Answers. By my Order dated October 28, 1976, trial in this matter was postponed indefinitely, pending resolution of the *res judicata* issues raised by Respondents' affirmative defenses. The parties thereafter filed briefs which have been duly considered.

Posture of the Case

On January 29, 1969, in *Decaturville Sportswear Co. v. N.L.R.B.*,[1] the Court of Appeals for the Sixth Circuit enforced, in part, a Board Order[2] based upon findings that Marlene and its subsidiaries had conducted a centrally directed and violent

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[1] 406 F. 2d 886 (6 Cir., 1969).

[2] *Marlene Industries, et al.*, 166 NLRB 703 (1967).

campaign of massive and deliberate unfair labor practices at all seven of their manufacturing plants, including numerous violations of Section 8(a)(1) and Section 8(a)(3) of the Act. Respondents' actions were in response to the Union's organizing campaign among employees of the subsidiary plants. Subsequently, the Board instituted contempt proceedings against Marlene and certain subsidiaries, based, *inter alia*, upon the June 23, 1970 discharge of employee Rushing at the Decaturville plant; the discharge of Decaturville employees who engaged in a protest of the Rushing discharge; the refusal to hire certain employment applicants, and reinstate certain strikers, at Decaturville; and the refusal to reinstate sympathy strikers at other plants. On May 23, 1975, the Sixth Circuit adopted the findings, conclusions and recommendations of its Special Master and ruled that Respondents were not in contempt of the Court's 1969 order.[3] Specifically, the Court approved the Master's findings that Rushing was discharged for insubordination; that the protesting Decaturville strikers were not justified in demanding that Rushing be reinstated and, therefore, their discharge was also not unlawful; that the sympathy strikers at other plants were striking, at least in part, for their own economic reasons and, accordingly, their walk-out without notice to Respondents, and without making any efforts to advise management of the nature of their grievances, was not protected activity; and that Respondents did not act illegally in refusing to hire certain Decaturville applicants and reinstate others. The Court noted:

> "The Special Master's mere mention of impermissible motives possibly playing some role in the dismissal of Rushing and others employees hardly rises to the level of clear and convincing evidence of impermissible dismissals justifying a finding of civil contempt. A contempt proceeding is a setting very different from a normal proceeding for the enforcement of a Board order. The burden imposed by the

[3] *N.L.R.B. v. Decaturville Sportswear Co., Inc.*, 518 F. 2d 788 (6 Cir., 1975); *cert. den.* 423 U.S. 913 (1976).

> clear and convincing evidence standard is heavy. The Board has failed to demonstrate that the Special Master erred in his findings or conclusions."

The status of the sympathy strikers at Respondents' Russell plant was not litigated before the Special Master but, rather, was the subject of a separate unfair labor practice case. On May 15, 1973, 2 years before the decision in the *Decaturville* contempt proceeding, the Sixth Circuit denied enforcement of the Board's order,[4] holding[5]:

> ". . . there is not substantial evidence to support the conclusion of the Board that the picketers were engaged in protected activity. There is no evidence in the record that the strikes at the other plants of respondent's parent were protected activity and thus, no evidence to support the conclusion in this case that the strikers at respondent's plant were entitled to protection as unfair labor practice strikers, the assumption on which the Board based its determination that the strikers' activities were protected. The strikers at respondent's plant could obtain no greater protection than that enjoyed by their counterparts with whom they were striking in sympathy."

On July 17, 1973, upon a petition for rehearing, the Court vacated its earlier order and remanded the matter to the Board "to determine whether the strike with which the strikers at respondent's plant were striking in sympathy was activity protected under the Act; to consider any additional evidence that may be offered; and to take such other action as it deems appropriate in view of this court's previous order."[6] Thereafter, the

[4] 197 NLRB 1116 (1972).

[5] *N.L.R.B. v. Russell Sportswear Corp.*, 71 L.C. 13667 (6 Cir., 1973).

[6] *N.L.R.B. v. Russell Sportswear Corp.*, 72 L.C. 13905 (6 Cir., 1973).

Board decided to accept the remand and ordered that the record in that case (9-CA-6384) be reopened. Subsequently, that matter was consolidated with the new round of Marlene cases now pending before me.

Of course, in its subsequent *Decaturville* decision, the Court answered the very question underlying the *Russell* remand, namely, whether the strike with which the Russell strikers were acting in sympathy, was protected activity. In *Decaturville*, the Sixth Circuit held that the Decaturville strike was an unprotected activity.

In the instant consolidated proceeding, the General Counsel seeks, not only to offer additional evidence pursuant to the Russell remand, but to relitigate the status and legal rights of the strikers at the other Marlene and former Marlene plants, the very matters tried before the Special Master whose report, as noted, was adopted by the Court of Appeals.[7] In response to Respondents' *res judicata* defenses, the General Counsel asserts that:

> 1. ". . . the very Circuit Court of Appeals who heard through its special master the contempt proceedings, remanded a companion case known as *Russell Sportswear Company* to the Board for the purpose of taking additional testimony regarding the nature of the strike at Respondent's Decaturville Sportswear Co., Inc. location;" and
>
> 2. ". . . the findings by the special master in the aura of a contempt proceeding did not preclude the General Counsel from litigating the underlying unfair labor practices which were present and which would be so found by the Board."

[7] While maintaining that the strikers were unfair labor practice strikers, the General Counsel alleges, alternatively, that the strikers were economic strikers, entitled to reinstatement rights as such, a matter necessarily encompassed by the prior litigation. Thus, the General Counsel concedes in its brief to me that the Court viewed the Decaturville strikers, and the sympathy strikers, as having "engaged in activity that was something less than 'protected concerted activity' . . ."

Analysis

The General Counsel and the Charging Party maintain, as a matter of law, that the findings and conclusions of the Court of Appeals in the contempt case are not entitled to a *res judicata* or *collateral estoppel* effect in this unfair labor practice proceeding before the Board, and, accordingly, that this matter should proceed to trial. They also urge that the Board, were it to view the same evidence and decide the same legal issues previously before the Court, would reach contrary conclusions. Indeed, the General Counsel, before the Sixth Circuit, accepted the findings of fact of the Special Master, excepting only to his conclusions of law. Finally, as noted, they point to the Court's *Russell* remand as indicating that the Court did not view its findings in the *Decaturville* contempt proceeding as having a *res judicata* effect upon retrial of those issues in a subsequent Board case.

The Court's remand in *Russell* preceded its decision in *Decaturville*. In the latter case, the Court decided the very issue earlier remanded to the Board and, accordingly, if the Court's *Decaturville* decision has a *res judicata* effect, it is also dispositive of the *Russell* case. As to the wisdom and correctness of the Court's decision in *Decaturville*, that matter is not for me, or the Board, to decide. The Court's decisions are the law of the case. The Court has determined that:

1. Rushing was discharged for cause;

2. The Decaturville employees who protested the Rushing discharge were engaged in unprotected activity and, thus, were themselves lawfully discharged.

3. The strikers at others of Respondents' plants were not engaged in protected activity.

4. The rights of the sympathy strikers at the Russell plant are dependent upon the protected nature of the strikes at Respondents' other plants.

5. The strikers at said other plants were unprotected activities.

I conclude, for the reasons stated below, that the findings and conclusions of the Court in the *Decaturville* case must be accorded a *res judicata* or *collateral estoppel* effect in this case before the Board, and that the General Counsel may not now relitigate the very issues previously litigated in that case.

While the Board has not previously addressed the precise issue involved herein, its holding in *Peyton Packing Company*[8] is instructive. There, the Board held that the General Counsel had proceeded improperly in attempting to twice litigate, before the Board, the withholding of a bonus as violations of different sections of the Act, and in twice litigating the cause of a subsequent strike. It noted:

> "Generally speaking, sound administrative practice, as well as fairness to respondents, requires the consolidation of all pending charges into one complaint. The same considerations dictate that where practicable, there be but a single hearing on all outstanding violations of the Act involving the same respondent. To act otherwise results in the unnecessary harassment of respondent."

Peyton did not occur in the context of a prior contempt proceeding, and did not, strictly speaking, involve *res judicata* principles. However, the courts have had occasion to consider those issues. In *Commissioner of Internal Revenue v. Sunnen*,[9] the Supreme Court set forth the policy considerations underlying the

[8] 129 NLRB 1358 (1961).

[9] 333 U.S. 591, 68 S. Ct. 715 (1948).

res judicata and *collateral estoppel* principles. Those doctrines, judicial in origin, are designed to prevent repetitious litigation and rest "upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations." In *United States v. Utah Construction & Mining Co.*,[10] the Court applied those principles to the findings of administrative agencies when acting in a judicial capacity, holding:

> "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." (emphasis in original text)[11]

Relying upon the Supreme Court's decision in *Utah*, a federal district court recently held, in *Eazor Express, Inc. v. General Teamsters Local 326*,[12] that the Board's findings in an unfair labor practice case are binding upon the parties in a subsequent suit under Section 303 of the Act. In a pre-*Utah* case, a Court of Appeals held that the Board was precluded from proceeding against two entities as a single employer since, in a prior proceeding, the Board treated those entities as separate employers. Although the issue "was not squarely presented nor squarely decided" in the first case, the Court ruled that the question was "necessarily involved," and stated:[13]

1953).

[10] 384 U.S. 394, 86 S. Ct. 1545 (1966).

[11] Cf. *Maxwell Company v. N.L.R.B.*, 414 F. 2d 477 (6 Cir., 1969), where the court refused to give a *res judicata* or *collateral estoppel* effect to the administrative decision of a Board Regional Director in a representation case since the Director's decision was not a quasi-judicial determination.

[12] 380 F. Supp. 1264 (1975).

[13] *N.L.R.B. v. Brown & Root, Inc.*, 203 F. 2d 139 (8 Cir.,

"The general rule is that 'any right, fact or matter in issue and directly adjudicated, or necessarily involved in the determination of an action before a competent court in which a judgment or decree has been rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the same parties and their privies, whether the claim, demand, purpose or subject matter of the two suits is the same or not." (citations omitted)

The Courts of Appeals for the Sixth and Ninth Circuits have recently addressed this issue, the former in the context of a contempt proceeding. Thus, in *N.L.R.B. v. Murray Ohio Mfg. Co.*,[14] the Court was faced with the exact converse of the instant matter. There, the Board sought to prosecute a contempt case against an employer for alleged violations of a prior court decree, based upon charges which had been the subject of a new unfair labor practice proceeding before a Board trial examiner. The Court held that such duplication of trials was unwarranted in view of the burdens of litigation facing the Board and the Courts.[15] In *N.L.R.B. v. Heyman*,[16] the Ninth Circuit concluded that the Board erred when it failed to accord any weight to the prior decision of a federal district court, in a Section 301 action, rescinding a collective bargaining contract. The Board, faced with the same parties and, essentially, the same contract issue, found violations of the Act based upon the continued existence of the contract. The Court held:

"We are of the opinion that the jurisdictional grant within §301 carries with it both the powers necessary to enforce judgments and to give judgments effect in such

[14] 60 LRRM 2257 (6 Cir., 1965).

[15] Contra. *N.L.R.B. v. Schill Steel Products, Inc.*, 480 F. 2d 586 (5 Cir., 1973).

[16] 92 LRRM 3603 (9 Cir., 1976).

quasi-judicial forums as the NLRB, through the application of such doctrines as res judicata or collateral estoppel . . . ."

The General Counsel and the Charging Party point out that, in the *Decaturville* contempt matter, the Court stated that it had applied a "clear and convincing evidence" test, rather than the customary evidentiary standards applied in a Board proceeding. In contending that the difference in burden of proof warrants a refusal to extend *res judicata* principles to the matters decided therein, they point to *Helvering v. Mitchell*.[17] There, the Court declined to give *res judicata* effect to an acquittal verdict in a criminal case when pleaded as a defense in a subsequent civil cause, noting that "The acquittal was merely an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused."

While the Court, in *Decaturville*, applied a strict evidentiary standard, it was not nearly as extreme as the "beyond all reasonable doubt" standard considered by the Supreme Court in *Helvering*. Moreover, unlike the situation surrounding a jury verdict of acquittal, we are not, here, left to speculate concerning the underlying findings of the Court. They have been set forth. In addition, in this case, the party resisting application of the *res judicata* doctrine himself chose the forum for the initial proceeding, aware of the more stringent burden he would have to carry in a contempt action.

In light of the case authorities cited above, and the policy considerations underlying those decisions, and with due regard for considerations of fundamental fairness and economic administration of the law, I conclude that relitigation should not be permitted here. At the present time, the Board and the Courts face critical litigation burdens. This matter has once been the subject of exhaustive trial before the Courts and, the

[17] 303 U.S. 391, 58 S. Ct. 630 (1938).

parties estimate, relitigation will require some 50 days of trial. If retrial were permitted, essentially the same evidence previously considered by the United States Court of Appeals for the Sixth Circuit would again be placed before it, contrary to the General Counsel's previous assurances to the Court that:

> "If the Board does not prevail, these proceedings are at an end and except in unusual circumstances, not present here and not to be anticipated here, the alleged violations will not be tried again."[18]

In harmony with those assurances, I conclude that further proceedings are unwarranted.

Conclusions of Law

1. The Respondents, and each of them, are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The allegations of the complaints herein, charging violations by Respondents of Section 8(a)(3) and (1) of the Act, are barred under applicable *res judicata* and *collateral estoppel* principles.

Upon the foregoing conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[19]

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[18] Opposition of the General Counsel to the Union's Motion To Intervene in the *Decaturville* contempt case.

[19] In the event no exceptions are filed, as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

Order

The complaint is dismissed in its entirety.

Dated, Washington, D.C., April 7, 1977.

/s/ IRVIN H. SOCOLOFF
Administrative Law Judge

APPENDIX F

In the United States Court of Appeals
for the Sixth Circuit

Nos. 18,064
18,154
18,249
18,250
18,256

National Labor Relations Board, Petitioner

vs.

Decaturville Sportswear Co., Inc., et al., Respondents

MEMORANDUM

This is an action instituted by the National Labor Relations Board, petitioner, (hereinafter referred to as The Board or NLRB) in which the United States Court of Appeals for the Sixth Circuit is requested to adjudge Decaturville Sportswear Co., Inc. and the other respondents to be in civil contempt of the decree of the United States Court of Appeals for the Sixth Circuit for failing and refusing to comply with the judgment entered on January 29, 1969,[1] and for other civil relief. The International Ladies' Garment Workers' Union, AFL-CIO, sought to intervene in the cause, a motion opposed by both the parties before the special Master. By an order dated May 4, 1972, the Master denied the Union the right of intervention for the reasons therein stated. The Master permitted the Union's counsel, however, the right of limited participation, and the Union counsel cross-examined some witnesses and offered others in support of the Board's position and its contentions. This case was tried before Harry W. Wellford, United States District Judge, sitting as Special Master, on various dates between May 2 and May 15, 1972, at Jackson, Tennessee, and the Special Master having considered the pleadings, the exhibits, the testimony of witnesses, the statements of counsel, and the entire record in this cause and being fully advised in the premises, finds the facts and states the conclusions of law as follows:

[1] 406 F.2d 886.

I. Decaturville Plant

A. Wage Increases

1. Among other things, this Court's order included a direction to cease and desist from:

> promising or granting to employees benefits, such as paid holidays, insurance, or vacation or bonus pay, when the purpose thereof is to interfere with the self-organizational efforts of employees or to induce employees to reject or refrain from activities in support of International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.

The Company's plant at Decaturville is charged with having violated the Court's decree by granting wage increases to their employees in July, 1969, January 1970, and July 1970, "with the effect of, interfering with, restraining, and coercing employees in the exercise of their rights of self-organization."

2. The Company[2] granted a wage increase to 274 of its hourly-rated employees at the Decaturville plant effective July

[2] "The Company" refers here to Decaturville Sportswear Co., Inc., but it is a wholly owned subsidiary of defendant Marlene Industries Corporation.

14. 1969. This wage increase varied in amount from five cents per hour to ten cents per hour. In the past, the Company had from time to time at irregular intervals granted wage increases of substantially similar amounts to employees having the same or equivalent job classifications. Some wage increases were necessary to comply with minimum wage statutory increases.

3. On or about December 27, 1969, the Decaturville plant granted wage increases to 288 of its hourly-rated employees in accordance with its past practice. The increases granted were generally in the amount of ten cents per hour. In addition, in January of 1970, the Company advanced the base rate for piece-rated employees from $1.75 to $1.85 per hour. The increase in the base rate did not, however, result in a wage increase to all of the employees compensated on a piece-rate basis. Both the wage increase of ten cents per hour to the hourly-rated employees and the change in the base rate from $1.75 to $1.85 per hour were in accord with the Company's past practice of granting periodic wage increases and/or changes in the base rate and were motivated, in part, by its desire to retain its competitive position in the labor market in the Decatur County area.

4. On or about July 13, 1970, the Company granted a similar wage increase to 264 hourly-rated employees at the Decaturville plant and increased the base rate for employees compensated on a piece-rate basis from $1.85 to $2.00 per hour.

5. The effect of the increases in the base rate was to increase the "potential" for increased earnings to production workers. Hence, those employees able to make their production quota would receive an actual increase in earnings with the increase of the base rate.

6. During 1969, Plant Manager, Lloyd Anderson, submitted a proposal to his superiors recommending a progressive increase system be installed so employees would be aware of how much to expect, but he received no response from his

superiors relating to his wage proposal. As a new plant manager, he did not participate in the July, 1969, raise but was consulted on the two subsequent increases. Although increases have been given since 1970, none were across-the-board. The increases in which Anderson participated in 1969 and 1970, were initiated by his superiors.

7. In 1969 and 1970, profits of Marlene Industries were less than they had been in prior years.

B. Unlawful Restraint or Discrimination Against Employees

1. The Court's decree has been in full force and effect since its entry on January 29, 1969, and at all times herein the Company has had notice and knowledge of its terms.

2. The Court's decree, in pertinent part, specifies that respondent will cease and desist from:

> (a) Discharging, laying off, forcing termination of, or otherwise discriminating against employees, in order to discourage membership in or support of International Ladies' Garment Workers' Union, AFL-CIO, [hereinafter referred to as the Union] or any other labor organization, or encouraging or permitting employees to engage in anti-union activity while prohibiting employees from engaging in activity on behalf of the Union.
>
> (b) Engaging in surveillance by photographing employees engaged in union organizational activities.
>
> (c) Creating an impression of surveillance of employees' union activities by telling employees that the Employer has lists of employees who engaged in union activities.
>
> (d) Threatening employees with discharge or other reprisals if they become or remain members of the Union or give assistance or support to it.

(e) Interrogating employees concerning their or other employees' union organizational activities or their opinions regarding union organization.

(f) Instructing employees to watch for union activities and listen for opinions regarding union organization of other employees and report findings to us.

(g) Threatening employees with closing or moving the plant should they engage in activities on behalf of the Union or select the Union as their collective-bargaining agent.

(h) Coercing employees by telling them that other employees had been discharged or would not be recalled because of their union activities.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities.

3. Maria Stanfill.

(a) The Union has been attempting to organize the Company's employees since 1965. In the spring of 1969, the organizing campaign was intensified as a result of this Court's order which, among other things, afforded the Union access to Company's parking lots and bulletin boards in furtherance of the Union's organizational efforts. Decaturville complied with these affirmative requirements fully, and the Union utilized these privileges actively.

(b) Maria Stanfill began working for the Company in 1964. She was employed as a "hemmer" under the supervision of Jo Essary (now Crawford). During June or July, 1969, Stanfill signed a union authorization card in the Company parking area. Assistant Plant Manager David Perrin who was standing approximately 15 feet away may have observed her sign the card.

(c) Maria Stanfill claimed that her supervisor queried her during the summer of 1969 about purported union activities, a charge the Company and the supervisor involved, denied.

(d) Stanfill began experiencing a change in her working conditions after the arrival of the new Plant Manager, Anderson, in 1969. Prior to Anderson, Stanfill would receive, for repair purposes, only those pairs of slacks which needed to be redone. Afterward, however, supervisor Essary would bring her an entire bundle of slacks whenever repairs were required, even if the repairs entailed only several pairs of slacks out of the bundle. As a result of such procedure, Stanfill was required to take production time, to search through entire bundles for specific pairs which needed repairing, and she was paid on the basis of the amount of pairs produced.

(e) On August 14, 1969, Stanfill claimed to be nervous or ill while working in the plant. At the same time, Stanfill expressed dislike for the type of material which she was sewing that day and stated that the work made her nervous. She reported her problem to Supervisor Essary and requested permission to leave the plant so that she could obtain medication and she wanted to change the work then assigned her. Essary stated that she would have to obtain the approval of Assistant Plant Manager Perrin before Stanfill could leave the plant under the circumstances. At that point, Essary left to find Perrin. She returned shortly thereafter and informed Stanfill that Perrin would not give permission for her to leave the plant. Stanfill

made no request to see Perrin herself before she decided to leave the plant, nor did she contact the plant that day or the next. Stanfill, who had visited her doctor in the intervening period, returned to the plant on August 18, with a note from the doctor. When Stanfill reached her work station, however, Essary directed her to report to Plant Manager Anderson's office. Pursuant to this order, Stanfill reported to the office where Anderson, Pollard and Perrin participated in a conference with her. Anderson told her that she no longer worked at the plant, since she had "voluntarily quit." Stanfill denied that she had quit, stating that she had "to go to the doctor" and had claimed to have been given permission to leave by Essary, which was denied by said supervisor. Stanfill had a prior somewhat erratic performance record with the Company.

I find there is insufficient clear and convincing evidence that Maria Stanfill was discharged because of her activities on behalf of the Union organizing effort. The Company did not discharge or involuntarily terminate employee Maria Stanfill on August 18, 1969, if she did not quit, for union activities.

(f) Stanfill also claimed to have been interrogated with respect to her Union sympathy by her supervisor. The Company doubtless knew of her Union disposition because others in her family were also so disposed, and because she may have made her Union affiliation apparent. While the supervisor denied any such inquiry, I find that Stanfill was queried about her Union inclination, by a company supervisor, but she was not coerced, threatened, or discharged because of her pro-union disposition.

4. Betty Williams

(a) Williams became a Decaturville plant employee in 1964 or 1965 and worked thereafter at various jobs in the plant. She apparently enjoyed a special relationship with the plant superintendent, Raymond Rindone, and under him, ad-

vanced to a quasi-supervisory type position in the thread department in 1967. She answered directly to Rindone until his discharge by the Company for conduct inimical to its interests.[3]

(b) After Rindone was replaced by Lloyd Anderson as plant manager in 1969, Williams' position changed. Neither Anderson nor his assistant, Perrin, gave her authority over others in the thread department or as a supervisor.

(c) Williams reported to Anderson the union sympathies of others in the thread department. Under Anderson's direction, there was obvious signs of "tightening up" in the thread department and some reassignments of responsibilities purportedly for greater operating efficiency. Williams continued to be paid hourly and she continued, for payroll category purposes, in the same status as she occupied when Rindone was manager.

(d) Williams was injured in an automobile accident in August, 1969, and after recovering returned to work in a different capacity. Her replacement in the thread room, Ruben Moore, was carried on employee pay records in July 1970, as supervisor of the thread room. I find that Betty Williams, during the year 1969, was not a supervisor within the meaning of Section 2(11) of the Act, although she probably had been considered in that status by previous plant manager, Rindone, for personal as well as company purposes.

(e) I find that Betty Williams was not discriminated against by the Company by reason of any union sympathy or activities.

5. Benson Rushing

(a) Benson Rushing was known to be a Union supported in the summer of 1969. Prior to December of 1969, several of the employees at the Decaturville plant, including Benson Rushing, regularly used the plant's station wagon to run errands.

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[3] Rindone's role will be discussed hereafter.

(b) In December 1969, the Company hired an employee to drive the station wagon on a full-time basis and discontinued the use of the vehicle on a part-time basis by those employees who had previously used it to run errands including Rushing. After December 1969, neither Benson Rushing nor any other employee was assigned to duties involving the driving of the Company station wagon on a part-time or casual basis. Nelson Rushing was reassigned to other duties, including pushing buggies of thread into other departments.

(c) I find that the Company did not unlawfully harass, intimidate, nor discriminate against Benson Rushing by reason of his union sympathy or activities. Neither did the employer unlawfully or in derogation of this Court's orders assign more arduous duties under more difficult circumstances in retaliation for his Union organizational activities, if any. Benson Rushing did not testify in these hearings.

6. R. C. Brashers

(a) R. C. Brashers began working for the Company in January, 1966, and worked as a "legger" in the pressing department. He served on the Union's in-plant organizing committee and his name appeared in a telegram the Union sent to the Company on July 23, 1969, which listed those employees serving on the committee. Brashers signed a Union authorization card, solicited fellow employees to sign cards and collected signed cards from a number of employees. He wore a Union button in the plant, attended Union meetings and engaged in handbilling the plant, when the Union began such activity pursuant to the Court's order in June, 1969.

I find from the above activity that the Company became aware of Brashers' union activity on or before July 23, 1969.

(b) On or about August 8, 1969, Pressing Supervisor Stevens told a group of pressers, including Brashers, that because of a shortage of work they were to be laid off for approximately one

week or 10 days. In response to a question, Stevens stated that the laid-off pressers were permitted to seek employment during the week of their layoff so that they could "make some extra money," provided that they reported back to work on Monday, August 18. Presser Oscar Smith, who was present during this conversation, also testified that Stevens gave the pressers permission to seek other employment during the layoff. Another presser, Eldridge Burge, moreover, who had been laid off the week previous to August 8, stated that Stevens had told the group laid off at that time that they could obtain other employment during the layoff.

During the week of his layoff, Brashers found work as a presser at a nearby plant operated by Salant and Salant, Inc. He began working at Salant and Salant during the week of his layoff and worked only a couple of days. Brashers returned to the plant on August 18, ready to resume his duties as a presser. His immediate supervisor, Joe Kennedy, advised him to report to the personnel office, and Personnel Manager Pollard informed Brashers that since he had accepted employment with Salant and Salant he was deemed to have "quit" the company's employment. When Brashers denied that he had quit, Pollard called Plant Manager Lloyd Anderson and Stevens to the office. Anderson reiterated that Brashers had quit. Brashers once again, denied that he had quit, pointing out, instead that the pressers had received Stevens' permission to seek and accept employment during the layoff. Stevens admitted that he, indeed, had permitted the pressers to find temporary employment so that they could have a chance to earn money while they were laid off. Thereafter, Brashers left the plant and he subsequently received a termination slip in the mail, which stated that he had voluntarily quit due to his having taken "other employment."

I find that there is substantial evidence that R. C. Brashers was discharged from Decaturville Sportswear, at least in substantial part, because of his activity on behalf of the Union organizing effort.

(c) The Company maintains that it has a firm policy against permitting a laid off employee to seek permanent employment elsewhere during the lay-off. There was evidence to the effect that Brashers applied at Salant and Salant on a permanent status contrary to Decaturville's rules. In this instance, however, the action taken by the Company towards Brashers, a long-time employee, who was seeking understandably to augment his income in accordance with a supervisor's suggestion,[4] appears to be motivated in substantial part by its desire to defeat the Union in its organizational activities.

7. Martha Thomas

(a) On or about October 14, 1969, employee Martha Thomas was directed by her supervisor to go to the office of plant manager Anderson because of Thomas' poor production. Present in Anderson's office were personnel director Pollard and assistant plant manager David Perrin. During the discussion Anderson advised Thomas to the effect that she could not get by without making production.

(b) This conference or discussion was recorded by a recorder in plain and obvious view during this discussion. Thomas claimed that Anderson, in substance, warned her about supposed Union sympathies. There is no support for her contention.

(c) I do not find that employee Martha Thomas was interrogated about nor interfered with concerning her Union sympathies by plant manager Lloyd Anderson under all the circumstances.

8. Doris Thorp

[4] It may be that Stevens' suggestions about seeking work elsewhere were misunderstood by Brashers and the other pressers. I credit Brashers with the sincere belief that he was encouraged to seek temporary work elsewhere during the lay-off.

(a) On or about March 9, 1970, a Monday, employee Doris Thorp was called into Anderson's office because she had left work early without permission on Friday of the preceding week. During the conversation between Thorp and Anderson, she claims that he asked whether she belonged to the Union.

(b) Thorp was disgruntled because of the work assignment given to her, and because she was given no explanation satisfactory to her about being assigned to joining work rather than side-seaming. She was, among other things, warned by the plant manager about her leaving the plant without permission, but she was not discharged.

(c) I find there is no clear or convincing evidence taken as a whole that plant manager Anderson interrogated employee Doris Thorp concerning her Union sympathies.

9. Ruth Bradley Campbell

(a) Ruth Bradley Campbell began her employment with Decaturville Sportswear in 1960, as Ruth Bradley, and had worked on several separate occasions since that time. On each occasion in the past, Campbell had voluntarily quit her employment. Her last period of employment before the episodes in question began in July 1968, when she was placed in the sewing department "serging flies," in which department her supervisor was Ruth Maness. During her employment, Campbell had performed most of the sewing operations available in the plant. She testified that she signed a Union card in July of 1969, wore a Union button in the plant, attended Union meetings and passed out authorization cards to other employees in the plant. In November or December of 1969, Mrs. Campbell told Maness, her supervisor, in response to an observation that the Company had a right to raise production, that such action was the reason why the employees needed a good union, and "if we had a good union they wouldn't raise it when they wanted to." In addition to speaking in favor of the Union to employees, Campbell also

for a period of two or three weeks, had Union literature and handbills laying on her machine.

I find that the Company was or became aware of Campbell's Union activity in or about November or December 1969, or perhaps before that time.

(b) On or about March 16, 1970, in the course of her duties, Campbell twisted her arm at the elbow while lifting a bundle of clothes. She advised Maness of the injury but continued working for the remainder of the day. The following day upon returning to work, Campbell discovered that swelling had developed in her arm, and after advising Maness of this fact, she visited the plant nurse in the first aid room. Campbell was directed by the nurse to see the Company doctor, Dr. Fisher, who examined and treated her arm on or about March 18, 1970. Fisher recommended that Campbell stay home from work for a few days and give her arm an opportunity to respond to treatment. Campbell remained off for two weeks, but then consulted the doctor about returning to work since she needed the earnings. Bradley had experienced muscle spasms previously in her left arm and shoulder during the year 1968. She was treated by her own doctor at this time, and based upon his examination, he recommended that she change jobs for a period of time until the spasms were relieved. During this period Campbell made a number of visits to Dr. Fisher. On or about the 28th of March, 1970, she returned to the Company with the statement prepared by Dr. Fisher which recommended that she should "avoid heavy lifting". Upon returning to the plant, Campbell presented Dr. Fisher's slip to Maness who indicated that she would try to find something light for her to do. She then met with Pollard and showed him Dr. Fisher's statement. Pollard told her that he had nothing for her to do unless she was prepared to return to her old job of serging flies, but suggested she seek a leave of absence until she was physically able to handle this job. This was in accord with the employer's policy in situations of this kind. After concluding that she could not

continue this work and after the refusal of requested lighter work, Campbell assumed that she had been fired and left the plant without applying for a leave of absence. She subsequently received a termination slip dated March 30, 1970.

(c) Campbell did thereafter return to Dr. Fisher because of a continued problem in her arm. She was, however, advised that Dr. Fisher had dismissed her from his care and, as a consequence, the Company's insurance no longer covered her condition. She concluded, apparently, that inasmuch as she would have to pay for the doctor herself she would stop seeing Dr. Fisher and go to her own doctor; and then began seeing Dr. Earl Salhany in Lobelville, Tennessee, who advised her that she had torn ligaments in her arm. Subsequent to obtaining a statement from Dr. Salhany on April 10, to this effect, Campbell returned to the plant where she showed the statement to Pollard, the personnel director. She applied for and received workman's compensation, receiving the last check on approximately June 29. Although she continued to remain under Dr. Salhany's care, she was, at the request of the Company, directed to go to Nashville for an evaluation by an independent physician, Dr. Davis, who concluded that her arm had healed satisfactorily and that she was able to return to work on a regular basis.

(d) Campbell then returned to the Decaturville plant and spoke with Anderson, the plant manager, after filling out an application for employment. She told Anderson that she had three children to support and needed work. After inspecting Campbell's personnel file with Pollard, she was refused an opportunity for reemployment.

(e) Campbell testified that after the period of receiving workmen's compensation benefits had expired when she sought reemployment unsuccessfully, Anderson observed that if he hired her, she would probably soon quit to join the picket line.

At this time, however, the Company was advertising for skilled employees, such as Campbell in the sewing department.

(f) I find there is insufficient evidence to establish that Ruth Bradley Campbell was discharged from the Company because of her activity by and on behalf of the employees' Union organizing campaign. I further find, however, that there is a substantial basis to determine that she was refused reemployment on or about June 30, 1970, because of the Company's fear that she would engage in Union activities, if re-hired. This was coupled with a reluctance to rehire an employee who had a history of physical complaints in the past; quitting, and workmen's compensation problems.

10. Bennie Hamm

(a) Bennie L. Hamm began working for the Company in January, 1966, as a floor helper in the pressing department. He served on the Union's organizing committee and his name appeared on a telegram the Union sent to the Company on July 23, 1969, which named those employees who served on the committee. Hamm was active in a Union organization effort throughout 1969. Additionally, during this time Hamm appeared on a Union-sponsored radio program, heard in the Decaturville area, on which he spoke on behalf of the Union.

I find from the above evidence that the Company was or became aware of Hamm's Union activity on or before July 23, 1969.

(b) After Anderson became plant manager, room supervisor Stevens began treating Hamm differently as there was a tightening of procedures in the pressing department, and he would warn him to stop talking on the job. Additionally, Stevens warned Hamm that he was using the restroom facilities too frequently. Hamm was illiterate, but this problem had not been mentioned as a difficulty attendant to his continued employment. The Company witnesses gave a variety of reasons

attesting to the importance of employee ability to read and write. Initially it should be noted, however, that the Company has no policy barring the hiring of illiterates.

(c) On April 23, 1970, Hamm sustained an injury in the plant while lifting some boxes. Shortly thereafter, he was examined by a physician who advised him that an operation was necessary. Hamm was granted an extended leave of absence on April 30, 1970, for surgery. Approximately eight weeks later, Hamm returned to the plant at the expiration of his leave of absence with a note from his doctor releasing him from further medical care. At that time, Hamm met with Personnel Manager Pollard. Pollard informed Hamm that, while he would place Hamm's name on the active list of employees, he was simultaneously laying him off by reason of lack of work. Hamm's particular job during the interim, had, in fact, been abolished.

(d) During the time Hamm was away from work recuperating from his injury, the Company phased out certain of its pressing operations so that when Hamm returned for work, his particular job no longer existed. Hamm was not qualified, according to the employer's testimony, for any alternate jobs as may have been available. As a consequence, on or about June 15, 1970, Hamm was laid off ostensibly for lack of work. After having drawn six weeks' unemployment compensation at the plant, Hamm was terminated in August 1970.

(e) I find there is substantial basis to determine that employee Bennie L. Hamm was discharged at the Decaturville Sportswear Plant because of his support and assistance in behalf of the employees' Union organizing effort. No doubt he was handicapped by his inability to read and write, but the Company at the time was seeking experienced help, and Hamm had been able to do his job for a number of years before his injury.

11. Nellie Mills and Paulette Rushing

(a) Nellie Mills was a long-time employee at the Decaturville plant in supervisor Carolyn Pratt's serving department. She

and a co-employee, Paulette Rushing, engaged in a conversation together on or about June 24, 1970, just before joining the strike, about being laid off, insufficient work, and production. The supervisor observed to them both that she hated to see everyone walk out because she feared for her own and her husband's jobs.

(b) Paulette Rushing was the sister-in-law of Nelson Rushing, (who will be discussed hereinafter) discharged by the Company the day before, and was also a long-time employee at the Decaturville plant.

(c) I find that the statement was made by reason of a natural and normal apprehension of the supervisor under the circumstances, and did not constitute a threat of plant closure.

12. Donald Pettigrew

(a) On June 23, 1970, the day when the strike commenced at Decaturville, Donald Pettigrew, whose mother was already an employee of the Company, appeared at the plant and completed an application for employment. Later that day, he received a phone call at his home from someone whom he believed was a secretary at the plant, advising him to report for work the following morning.

That next morning, Pettigrew reported to the plant, and with four other applicants, met with Personnel Director Pollard, who indicated they had been hired. Pollard outlined various plant rules and inquired if any of them could perform work as pressers.

(b) At that point, the meeting was interrupted by one of the personnel staff, who informed Pollard that some of the employees had just walked out. Pollard then left his office; returned shortly thereafter, and then asked all of the prospective new employees, except Pettigrew, to leave the office. Pollard then told Pettigrew that he was not going to hire him. When pressed

by Pettigrew as to the reason, Pollard indicated that it was because his mother walked out with the others. In response, Pettigrew stated that "just because [my mother] walked out [doesn't] mean I'm going to walk out". Pettigrew then left the plant without being hired.

(c) Pettigrew had previously unsuccessfully applied for work at the Decaturville plant while in school, and he had also applied for work unsuccessfully a number of times before at nearby Salant & Salant. Other persons were hired in the pressing department as needed on June 24, 1970, because of the walkout.

(d) I find that Donald Pettigrew was refused employment because the Company feared that he would engage in Union activity.

13. Linda Williams

(a) Employee Linda Williams joined the strike on June 26, 1970, and appeared on the picket line. Upon arriving home in the afternoon on that day she received a telephone call purportedly from her supervisor (or former supervisor), Edna Hendon, a good friend. Hendon asked Williams if she thought that the employees were going to do any good by going out on strike and was she doing the right thing by going out and losing her job. Hendon confirmed the fact that she did call Williams the day she walked out and asked her to think it over and come back to work.

(b) Hendon was later in early 1971, demoted and quit rather than accept a new job assignment. She obviously harbored some resentment against the Company for what she considered mistreatment in denying that she had received warnings about the quality of her work as a supervisor. The Company was, however, dissatisfied with Hendon's job performance.

(c) I find supervisor Edna Hendon interrogated employee Linda Williams about her Union activities.

14. Lois T. Page

(a) Employee Lois T. Page joined the strike sometime after a July 4, 1970 vacation. Shortly before that vacation, she testified that a supervisor, Parker Maness, approached her at her sewing machine and asked if she were going to join the strike; Maness then purportedly indicated that he supposed some of the people that walked out would probably be fired.

(b) Maness denied this conversation in its entirety. I find a lack of clear and convincing evidence that supervisor Parker Maness did anything more than interrogate employee Page about her Union activities, if he did even this. I find no threat or coercion on the part of supervisor Maness.

15. Evelyn Phillips

(a) Evelyn Phillips had worked off and on for Decaturville from 1964 until 1969. She had previously twice been fired and had consistently been a low production worker at the plant. In 1969, she had quit after previous leaves of absences. Altogether, her record prior to 1970 was an unsatisfactory one.

(b) On or about July 24, 1970, Evelyn Phillips appeared at the plant, filled out an employment application and was interviewed by Personnel Director Pollard. Phillips expressed a preference for a position as a "tacker," a job she had performed when she worked for the Company on prior occasions. Pollard then contacted Phillips' former supervisor in the tacking department and inquired if she needed another tacker, and Pollard advised Phillips that a tacking position was available.

(c) Phillips' husband was a relative of Nelson Rushing, a leader in the strike. On July 27, Phillips returned to the

plant and reported to Pollard's office. At that time, Pollard informed Phillips that he was sorry that he could not use her, apparently fearing that she, too, would join the strike. She then left the plant and did, in fact, join the picket line.

(d) I find that job applicant Evelyn Phillips was denied employment by the Company on July 24, 1970, in part because of the Company's fear that she might engage in Union activities, but also because she had a poor previous record.

16. Judy Scott Maness.

(a) Before her marriage, as Judy Scott, Mrs. Maness had worked at Decaturville for about a year. After moving away, she returned in late 1969 to work and joined the strike on or about June 26, 1970. During September of 1970, she abandoned the strike and asked to be re-employed. The Company had on June 26, 1970, sent her a letter directing her to return to work by the following Monday or she would be replaced.

(b) She was questioned when she returned as to her complaint and the basis for her walking out. Her complaint was related to frequent changes in production procedures and quota which she termed an "unfair labor practice" and had nothing to do with the Nelson Rushing-pressers situation. She was told that she would be called if a place became available but that her position had been filled. Later, in October of 1970, she returned to the plant and signed a termination notice "voluntarily quit as of June 26, 1970" after having been requested to do so. She felt this was necessary to get a separation slip in order to get another job if Decaturville had nothing for her.

(c) Maness made an unconditional application for re-employment in September 1970.

17. Peggy Cagle.

(a) Cagle had been a seven year employee of Decaturville when she walked out June 24, 1970, to support Nelson Rush-

ing, another long-time employee, who had been fired. She was also dissatisfied at the time about her job assignment. She abandoned the strike to seek to return to work in September of 1970. As in the case of Judy Maness, she was asked to fill out a new employment application, and her reasons for joining the strike were inquired into.

(b) She also was sent a letter on or about June 24, 1970, by the Company directing her to report in a few days or she would be replaced. She received this letter, and like Maness, did not return as directed. She was told in September that her tagging job had been filled but they would call her in a few days if there were an opening. On or about October 8, 1970, Cagle returned to the plant and signed a termination notice, "voluntarily quit as of June 24, 1970." She felt this would assist her to get a job elsewhere and in obtaining a separation slip.

(c) Cagle made an unconditional application for re-employment in September 1970.

18. Nelson Rushing

(a) Nelson Rushing was the senior man in the pressing department, having been with the Company at Decaturville since the plant opened in 1960. When Lloyd Anderson became plant manager in 1969, inspection began to be tightened up and quality control procedures were made more stringent. Rushing was in the hot head pressing section with some 12 or 13 other pressers. After Anderson took over, Rushing also observed that there were changes in rates effectuated, and more pants were being returned out of bundles completed for repressing. Rushing had performed just about every function at one time or another in the pressing department.

(b) Because of the changes being effectuated and general dissatisfaction with them, Rushing became involved in Union

activities, and there was considerable discussion taking place in the pressing department during the break and lunch periods about unionization, during 1969 and in 1970.

(c) Rushing was unhappy, because he was a production worker, when in 1969, pants that needed re-pressing were returned marked in bundles and had to be separated or pulled out of the bundles by the presser. Complaints were made to supervisors but Rushing felt little was being accomplished about these grievances, although at one time he and other pressers had a discussion with Anderson about the situation. The effect of these practices, according to Rushing, was to lower his production pay, and he did not like the changes. He felt that the former plant manager, Rindone, had been more understanding, easier to get along with.

(d) In 1969, Rushing and other pressers initiated a work stoppage, which apparently called attention to their complaints and brought Rindone's attention to their grievances. Shortly thereafter in 1969, after Anderson became manager, however, another work stoppage resulted in a warning from Anderson that if it occurred again, the participants would be discharged.

(e) In 1970, inspection became tighter, and some pants approved by Henley, the pressing supervisor, were returned by quality control inspectors down the line for re-pressing. The Company adopted a policy of requiring all bundles which contained three improperly pressed garments out of any ten selected at random to be returned to the employee who had pressed the defective garments. Such employee was then required to inspect the bundle and make such corrections or repairs as were necessary. After Lloyd Anderson became plant manager, this policy was applied more consistently and uniformly to all pressers under more stringent quality control requirements.

(f) During the morning of June 23, 1970, supervisor Henley inspected a bundle of 60 to 80 slacks which were recently

pressed by Nelson Rushing, a topper, and his legger, Milton Moore. Henley returned several pairs to Rushing for repressing. Henley returned to Rushing's station shortly before the pressers' morning break and indicated that there was a policy change so that if there were as many as three pairs of pants returned out of any bundle the presser would have to go and inspect through the entire bundle. Henley stated that he was advised of this rule by Ed Stevens, his supervisor. Rushing immediately protested, stating that the pressers were inspectors. Rushing then demanded that Henley check with other officials concerning this policy which would, he felt, reduce his production, and refused to do this work. Henley then turned to Moore, the legger, and asked him to inspect the bundle. Moore replied that he agreed with Rushing. Other pressers, Hancock and Cressing, objected also to this new procedure.

(g) Stevens, accompanied by Henley, came by Rushing's work area shortly thereafter inquiring about the trouble and Rushing advised that the situation needed to be straightened out since the pressers were now being asked to "inspect" bundles and they weren't going to do this. When Stevens stated that he could do nothing about the problem, Rushing responded that he "go discuss it with Anderson [and] find out what can be done." Pressers Hancock and Cressing approached Stevens and stated they agreed with Rushing. Stevens then advised the pressers that he would "go take it up with Anderson."

Shortly thereafter, Stevens returned and informed Rushing and the other pressers that Anderson wanted to see them in his office. Hancock stated that he did not want to go to the office since he had been there before and had accomplished nothing. However, Hancock added that Anderson should come discuss it with the pressers. Stevens then left and most of the pressers went to the lunch room.

(h) Shortly after the break period began, Anderson appeared in the cafeteria accompanied by Stevens and Pollard,

personnel director, and asked to see Rushing in his office. Rushing refused to go to the office because he said it concerned all of the pressers, and because he feared being discharged in private. Rushing persisted in his refusal to go to the office.

(i) I find that Nelson Rushing was discharged both for his concerted activity with others in the pressing department, which activity he initiated, but also for his public and adamant refusal to meet with the company plant manager to discuss the problem and complaint.

19. Other Pressers

(a) The findings with respect to Nelson Rushing are reiterated insofar as they involve and affect other pressers who were subsequently (or concurrently) involved.

(b) Prior to the beginning of the Union campaign in 1969 and 1970, the pressing department was composed of approximately 54 pressers and bundle boys under the supervision of Edward Stevens. The pressers, who worked in pairs, a "topper" and a "legger," had their work inspected to determine if any defects existed in the pressed garments. The inspection function, until on or about June 23, 1970, was performed by quality control inspectors and pressing department supervisors. If any pair of slacks were found by a supervisor to be incorrectly pressed, he would return that pair to the presser involved for correction. If the quality control inspectors subsequently rejected certain pairs of pants the supervisor would bring those pairs back to the presser for re-pressing. Occasionally, the supervisor would return an entire bundle of slacks that the presser had worked on, which bundle would contain red tags or some other indicator, on those specific garments which needed repressing.

Subsequent to the commencement of the Union campaign on the Company's premises, some pressers became an active

intra-plant force on behalf of the Union, a fact which was known or should have been known to management. Additionally, the pressers openly discussed the issue of unionization in the plant and had discussions on the subject during lunch time and break periods.

(c) Plant Manager Anderson, who assumed his position at approximately the same time the Union obtained access to Company premises, immediately began imposing changes in the working conditions and enforced prior procedures in this department not previously uniformly observed. One change involved the use of "snap hangers" rather than the ordinary clothes hangers they had been using. The pressers who were paid on the basis of a production rate were formed to adopt themselves to this change and their wages may have suffered as a consequence. Additionally, the pressers began receiving more slacks back for repressing from quality control. The pressers were not paid on a production basis for any repressing work they would be called upon to perform. Some pressers determined they were unhappy about their working conditions, since they were suffering losses in their pay and as a result, the pressers began voicing their grievances to their immediate supervisors and to Anderson, including a complaint about too stringent inspections.

(d) I find that there was a history of tighter controls imposed and enforced by Anderson and consequent employee complaints in the pressing department stemming from approximately the time that Anderson assumed his duties as plant manager.

(e) After the episode on June 23, 1970, in which Nelson Rushing refused to do certain repressing and/or inspection work, and also refused to meet with Mr. Anderson privately, most of the pressers then and there expressed support of Rushing and dissatisfaction with the decision to fire him.

(f) One presser, Hancock, then asked Anderson if he really meant "to fire him [Rushing] over this?" Anderson reiterated that Rushing was indeed discharged. Hancock offered that "we could work out something about [this incident and] get back [to the department] and make some kind of production." Anderson, however, rejected the offer stating, "I'm not making any deals." Hancock and the others responded to the effect that if Rushing were fired, then "the whole bunch" might as well be fired.

(g) All of the pressers then followed Anderson to the office and were given their final checks and their termination slips which reflected that they were being discharged for insubordination. I find that the Company discharged approximately 54 other employees besides Rushing working in the pressing department on June 23, 1970, because they collectively protested the discharge of Nelson Rushing and refused to receive work under the conditions in existence in the pressing department.

C. General Findings of Fact—Background and Supplementary

1. Marlene Industries has strenuously resisted I.L.G.W. Union efforts to unionize its employees, particularly at the Decaturville, Tennessee plant since 1965. Some of the zealous steps taken to effect this purpose were contrary to the requirements of the N.L.R.A. and were found both by the National Labor Relations Board and this Court to have overstepped the bounds of both propriety and legality. In 1969, this resulted in the Union's being given broad access to Company parking lots, bulletin boards, and resulted in other affirmative relief in favor of the Union and its organizational activities. Albeit under protest and reluctantly, the Company has not interfered with the Union or the employees in connection with Union access and availability on Company premises under these orders.

2. Prior to 1969, Raymond Rindone had been plant manager at Decaturville. He was discharged in mid-1969 for activities that involved embezzling Company funds, maintaining false payroll records, and other related activities. These and other illegal activities of Rindone came to the attention of this Court upon an indictment of Rindone charging federal tax violations, to which Rindone plead "nolo contendere."[5] The pre-sentence report indicated, among other things, without being specific, evidence of Mr. Rindone's "special relationship" with a number of females in the Decaturville community.

3. Mr. Rindone's administration of the Decaturville plant was not marked by uniform supervision and control with regard to policies and procedures enforcing quality control and plant discipline. His successor, Lloyd Anderson, imposed Company-wide procedures, unpopular with production employees, designed to increase both quality and quantity of production and plant efficiency. Employees in a number of departments complained about these new procedures, rates and scales of production pay, and enforcement of disciplinary policies, some of which had not been previously enforced, or at least, not uniformly enforced prior to 1969.

4. During 1966 and subsequent years, Marlene Industries was again charged with unfair labor practices in connection with its activities at another plant, but the charges were not sustained.[6] At this time it was evident that the Union was continuing its organizational activities. Until June 23, 1970, in any event, the Union was actively and continuously, with the assistance of its professional organizers, attempting to organize the Decaturville plant.

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[5] See cause No. 9276, United States District Court, Western District of Tennessee (Eastern Division).

[6] 171 N.L.R.B. No. 118 (1968). See also 183 N.L.R.B. No. 127 (1970) and 184 N.L.R.B. No. 82 (1970).

5. Immediately after Nelson Rushing and the other pressers walked out of the Decaturville plant on June 23, 1970, picketing began at this plant with active assistance of Union agent D. O. Warren, who was then in the Company parking lot. The pressers informed Warren that they had all been discharged due to their adherence with Nelson Rushing's position. Warren stated that they would receive the Union's support if they wanted it, however, he asked them to be patient, as far as a course of action was concerned, since he would have to check with Union headquarters. Warren then met with Mary Cameron, the Union's Tennessee State Director, and informed her of what had taken place.

Cameron in turn contacted her superior, Nickolas S. Banano, the Union's Southeast Regional Director for organizing. Cameron advised Banano, that one of the pressers, Union adherent (Rushing) had been fired and that the other pressers in the department had walked out in sympathy with him. Based upon Cameron's report, Banano directed her to offer the Union's assistance to the employees and to indicate that the walk-out was in the nature of an unfair labor practice strike. After conferring with the Union's legal staff, Banano placed another call to Cameron with respect to ceasing organizational activities among the Company's employees.

6. Based on the instructions of his superiors, Warren, on the afternoon of June 23, established a picket line at the Decaturville plant and distributed picket signs which contained the following wording:

> "On Strike Against Marlene Industries, for Unfair Labor Practices, Workers of Marlene International Ladies' Garment Workers' Union."
>
> "We Support the Workers at Marlene Industries Workers Against Unfair Labor Practices, International Ladies Garment Workers Union."

Later the same day, a meeting of approximately 50 to 60 striking employees was held at which time Warren outlined the Union's strike benefits and discussed picketing and strike procedures and violence on the picket line was sought to be avoided.

On or about June 30, Banano met with approximately 60 to 70 striking employees and explained the Union's position in support of the strike. He outlined strike benefits and advised that organizational activities were not to continue as performed previously. Banano explained that the Union was claiming that the reason for the strike was the Company's unfair labor practice in discharging Rushing and the other pressers on June 23. Subsequently, during the second week of July, Union attorney David Goodman met with the striking employees and also discussed the reasons for the strike with them. Some handbills were distributed thereafter advising employees of the status of the strike, and some solicitation of cards and other organizing efforts continued, but the emphasis after June 23, 1970, was on the strike and picketing. The wording of the picket signs remained the same throughout the course of the strike.

7. On June 24, 1970, the Company addressed a letter to each of the pressers and bundle boys, except Nelson Rushing, who had been discharged on June 23, 1970, and offered them full and immediate reinstatement of their position, without loss of seniority or any other privileges provided they reported for work by a specified time. Some of the pressers returned to work; others did not and continued to picket outside the Decaturville plant. Similar letters were sent to other employees who subsequently quit to join the picket line.

8. Although the Union hierarchy made efforts to characterize and to confine the strike at Decaturville as one for alleged unfair labor practices, there were continued, although somewhat spasmodic, attempts to organize and to recruit further workers into the I.L.G.W. Union. Some Decaturville strikers were sent to

other Marlene plants by the Union in support of picketing at these other plants.

9. Those striking employees who left work and joined the strike on or after June 26, 1970, were written a letter by Anderson directing them to return to work by a deadline date. Anderson testified that those employees who returned after the deadline specified in the letter were required to fill out new employment applications, and return as new employees at the bottom of the seniority list. Anderson further testified that seniority play a part in layoffs, holiday and vacation pay.

I find that these employees who failed to return to work prior to the deadline specified in the Company's letter to striking employees were required to file new applications for employment and were treated as new hires.

10. Approximately July 15, 1970, Banano issued instructions to his subordinates who, at the time, were organizing employees at the Company's other Tennessee, South Carolina and Alabama plants, to establish picket lines at those plants in support of the strike of employees at the Decaturville plant. Some or most organizational activities, as such, as those plants were also discontinued and picket lines were displayed at those locations with the same wording as displayed on the signs in Decaturville. No demands for recognition as employee bargaining representative have been made upon the Company at any time during the entire course of the Union organizing effort. I find that most of the Company's employees at Decaturville Sportswear Co., Inc., did on June 23, 1970, and thereafter strike in protest of the discharges of the employees of the pressing department at Decaturville Sportswear Company, Inc., and also in support of the Union's organizational efforts there.

D. Conclusions—Decaturville

1. This Court has jurisdiction over the subject matter and the parties in this action.

2. Regarding all of the wage increases alleged in the petition, as amended, the Petitioner failed to sustain its burden of proof that these wage increases violated either the National Labor Relations Act or the decree of this Court. See *N.L.R.B. v. Cleveland Trust Co.*, 214 F.2d 95 (6th Cir. 1954). See *Hagopian v. N.L.R.B.*, 395 F.2d 947 (6th Cir. 1968), wherein it was held that it must be shown that the benefits were granted to discourage a union organization effort. It was established that the granting of the wage increases was part of an established practice, grounded upon legitimate and substantial economic justifications that were essentially uniform in character. There was insufficient evidence establishing in a clear and convincing manner that the granting of these wage increases had any adverse effect upon the Section 7 rights of the employees of the Company or that the wage increases were granted primarily as a result of anti-union motivation by the Company. A part of the increases granted were as a result of minimum wage requirements. I conclude that the Company violated neither the National Labor Relations Act nor the decree of this Court in granting these wage increases. *Louisburg Sportswear Co. v. N.L.R.B.*, 462 F.2d 380 (4th Cir. 1972); *Hagopian & Sons, Inc. v. N.L.R.B., supra;* and *Jervis Corp. v. N.L.R.B.*, 387 F.2d 107 (6th Cir. 1967). I further conclude that the raises did not interfere with employees in the exercise of their rights to self-organization.

3. Company policies regarding increased quality control and inspection requirements in the pressing department, as well as in other departments, coincided with the administration of the Decaturville plant under its new manager, Lloyd Anderson, beginning in 1969. Profits were not as good as in prior years; problems had been encountered with the previous plant manager, Rindone. This policy was grounded upon legitimate and substantial economic justifications, and resulted in an increase in the quality of the work at the Decaturville plant. There was insufficient evidence that this policy constituted an unfair labor practice; they were not "inherently destructive," and did not violate the Court's decree. *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32 (1967). (See particularly, Judge Harlan's dissent).

4. The Company did not discourage Union membership nor engage in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, nor violate this Court's decree, by discriminating against, intimidating, or discharging Maria Stanfill, Betty Williams, Benson Rushing, Martha Thomas, Ruth Bradley Campbell, Lois T. Page, or Evelyn Phillips.

5. The Company did not unlawfully nor in violation of this Court's decree interrogate as to union activity or sympathy, or put under surveillance, Maria Stanfill, Betty Williams, Martha Thomas, Doris Thorp, Ruth Bradley Campbell, Nellie Mills, Paulette Rushing, Lois T. Page, or Evelyn Phillips. *Jervis Corp. v. N.L.R.B., supra*, and *N.L.R.B. v. Dale Industries*, 355 F.2d 851 (6th Cir. 1966).

6. R. C. Brashers was discharged, at least in substantial part, by reason of his union activity and this conduct constituted an unfair labor practice. Under the circumstances, I also find that it violated (a) of the Court's decree in respect to Brashers.

7. Maria Stanfill, Betty Williams, and Linda Williams were interrogated concerning their or other employees' union organizational activities and/or their union opinions contrary to Section (j) of the Court's decree. The nature of the interrogation, however, was not such conduct that also amounted to a violation of other portions of the Court's decree with respect to threatening employees, warning or coercing them. *Southwire*

Co. v. N.L.R.B., 383 F.2d 235 (5th Cir. 1967), *Suprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756 (6th Cir. 1965).

8. The Company did discriminate against and refuse to re-hire Benny Hamm and R. C. Brashers because of their Union activity and adherence, and the fear that they would continue such activity while on the Company payroll.

9. The Company did refuse to hire Donald Pettigrew primarily because of a fear that he would join the picketing and the strike then in progress at the plant.

10. While there was substantial evidence to show that the Company refused to re-hire Ruth Bradley Campbell, Evelyn Phillips, Judy Scott Maness and Peggy Cagle because of their Union proclivities, there was also substantial evidence to show other sound and justifiable business reasons for the decision not to take these employees back. Both Campbell and Phillips had poor previous records and were serious employment risks either from a health standpoint or for production or attitude reasons. Both Maness and Cagle had quit to join the strike (for differing reasons) and refused immediate reinstatement or to communicate with the Company within a prescribed period in which replacements were sought and accepted. I would conclude that appropriate relief, if any, should be limited to re-hiring as and when a next available opening were determined to exist at a comparable position to that held at the time of termination. I do not constitute such refusal to re-hire these four employees as an intentional or deliberate violation of the Court's decree as to these employees. *N.L.R.B. v. Ogle Protection Service*, 375 F.2d 497, 505 (6th Cir. 1967), and *Tompkins Motor Lines v. N.L.R.B.*, 337 F.2d 325, 330 (6th Cir. 1964).

11. Because of the circumstances of his conduct on June 23, 1970, employee Nelson Rushing was insubordinate and, accordingly, was discharged for just cause, even though Rushing was also protesting what he believed was unfair. The Company's

actions surrounding his discharge were not shown to have been prompted essentially by any anti-union considerations. The discharge of Nelson Rushing, therefore, constituted neither an unfair labor practice nor a violation of the decree of this Court.

12. The remaining pressers were not justified in their demands that Rushing be reinstated or rehired by plant manager Anderson on June 23, 1970, before they would return to work. These pressers were not discharged by the Company unreasonably under the circumstances, despite anti-union sentiment on the part of the Company.

13. If, however, the Company acted improperly, unlawfully or unreasonably in discharging the pressers other than Nelson Rushing on June 23, 1970, for engaging in a concerted work stoppage, they should not now in equity be entitled to reinstatement since the Company offered to them full reinstatement on June 24, 1970, by letter which most chose to ignore or to decline. The offer of the Company was a bona fide effort to reinstate. If accepted, the pressers on strike would not have sustained any diminution in seniority, earnings, or any other privileges which they enjoyed prior to their termination. All employees who went out on strike in protest of Rushing's discharge, claiming such to be an unfair labor practice, were in fact economic strikers as well as unfair labor practice strikers. *AHI Machine Tool & Die, Inc. v. N.L.R.B.*, 432 F.2d 190 (6th Cir. 1970); *LTV Electrical Systems, Inc. v. N.L.R.B.*, 408 F.2d 1122 (4th Cir. 1969). It has been concludied that Nelson Rushing's discharge was not an unlawful or unfair labor practice under the circumstances of insubordination. His actions were disruptive of order and discipline. *Hagopian & Sons, v. N.L.R.B., supra*. Although the other pressers were upset about the new and changed procedures in their department, they walked off their jobs primarily in sympathy with Rushing. Theirs was a concerted protest as well, however, involving working conditions, but it was not because the Company had illegally discharged Rushing but, rather because Rushing was fired regard-

less of its illegality, and because of their frustration over working conditions. The Union attempted to make the strike an unfair labor practice strike rather than an economic one. This strike instigated by the pressers has connotations of concerted activity protected by the National Labor Relations Act, and was activity within the broad purview of the National Labor Relations Act, though the strike also was essentially economic in its nature, because the imposition of stricter quality control procedures has also been concluded not to have been an unfair labor practice.

14. In summary, with respect to the pressers, it is concluded:

(a) the imposition of tighter quality control procedures was not an unfair labor practice nor violative of this Court's decree.

(b) Nelson Rushing's actions in protesting the new quality control procedures also amounted to insubordination in his public and adamant refusal to discuss his grievance privately with or to obey reasonable orders of the plant manager; therefore, discharging him was not an unfair labor practice nor violative of this Court's decree.

(c) the quality control procedures involved did involve working conditions in the plant.

(d) the action of the other pressers in walking off in support of Rushing was concerted activity involving both working conditions and protest over a lawful firing. *N.L.R.B. v. MacKay Radio Co.*, 304 U.S. 333 (1938), *N.L.R.B. v. Phaostron Instrument Co.*, 344 F.2d 855 (9th Cir. 1965), and *Hagopian & Sons v. N.L.R.B., supra.*

15. It was not an unlawful or unfair labor practice, nor one violative of this Court's Orders for the Company to replace striking employees with others in an effort to carry on its business. Nor is the Company bound to discharge those hired to fill the places of strikers upon their subsequent election to resume their employment. The Company should therefore only

be required to replace those unconditionally seeking reemployment having abandoned the strike as and when there were vacancies. This, I conclude, is all that the Company should be required to do with those strikers (pressers and others) who had not otherwise been terminated for just cause (such as Ruth Campbell) and who did seek re-employment (as Cagle and Maness). *N.L.R.B. v. MacKay Radio Co.* 304 U.S. 333, 345-6 (1938), and *Kellog Co. v. N.L.R.B.*, 457 F.2d 519 (6th Cir. 1972).

16. Liability in civil contempt proceedings, such as this one, should be established only upon a showing of "clear and convincing evidence," that respondent has engaged in contemptuous conduct violative of the Court's decree. *N.L.R.B. v. Local 5881* UMW, 323 F.2d 853 (6th Cir. 1963), and *N.L.R.B. v. Lynair, Inc.*, 380 F.2d 286 (6th Cir. 1967).

17. We have found "clear and convincing evidence" of violation of the Court's order by respondent with respect only to discrimination or misconduct in the particulars specified. The Board has failed to sustain its contentions, except as indicated, as to Maria Stanfill, Betty Williams, Benson Rushing, Martha Thomas, Doris Thorp, Ruth Bradley Campbell, Nellie Mills, Paulette Rushing, Lois T. Page and Evelyin Phillips. It has sustained only those portions of its charges of civil contempt with respect to R. C. Brashers, Bennie Hamm, Donald Pettigrew, Linda Williams, Judy Maness (in part), and Peggy Cagle (in part). The Nelson Rushing episode and the pressers' walkout have been discussed separately.

II. **Trousdale, Tennessee Plant**

A. Wage Increases

1. Marlene's plant at Trousdale was charged by the Board with granting wage increases in violation of Section (d) of this

Court's cease and desist order, the pertinent language of which has heretofore been set out at page two.

2. The Company[7] granted a wage increase to hourly rated employees on or about July 14, 1969, January 12, 1970 and July 1, 1970. The base rate for production or time workers was increased also from $1.75 to $1.85 per hour in January 1970, and again to $2.00 per hour in July, 1970. From time to time, the Company at somewhat regular intervals had previously granted similar wage increases, some of which were necessary to comply with minimum wage statutory increases. Base rates were attempted to be maintained at higher than minimum wage scales as was the case at Decaturville. Approximately 75% of the employees were maintained at rates higher than minimum wage by reason of the periodic increases and adjustments.

3. At the Company's Trousdale Manufacturing Co., Inc. plant in Hartsville, Tennessee, a wage increase was granted effective July 14, 1969, to 104 hourly-rated employees, normally in a ten cent increment in accordance with general past practices of the Company.

4. On July 13, 1970, 155 hourly-rated employees at the Trousdale plant were granted wage increases in amounts varying from five cents to fifteen cents per hour, and the base rate for piece-rated employees was increased from $1.75 to $1.85 per hour.

5. On or about July 25, 1970, at its Trousdale plant, the Company granted twenty-six of its employees wage increases in increments ranging from five cents per hour to twenty-five cents per hour and, in addition, increased the base rate for piece-rated employees from $1.85 to $2.00 per hour.

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[7] "The Company" refers here to Trousdale Manufacturing Company, a wholly owned subsidiary of Marlene Industries Corporation.

6. The plant manager of Trousdale during the period of these increases was Dan Miller who terminated his employment with Trousdale in 1971. He was not available to testify, but he approved the three increases made, and furnished the list by which the payroll clerk effectuated these increases.

7. The Union was actively attempting to organize the Trousdale facility during 1969 and 1970, and Union organizers were present to assist in this activity. In 1969 and 1970, Marlene's profits were down from prior years.

8. I find that there is not sufficient evidence upon which to infer or to determine that these wage increases were granted to defeat the organizing efforts of the Union rather than to conform to past practice and experience.

B. Cole-Robinson Incident

1. Robert Cole was general manager for Marlene, being general supervisor and superior over Dan Miller, the plant manager at Trousdale. The I.L.G.W. Union began to picket this plant in July 1970, purportedly as a follow through and in broad protest to alleged unfair labor practices in Decaturville.

2. Burle Robinson was an experienced Union organizer for I.L.G.W. Union assisting in the picketing and the strike at the Trousdale plant. He had been at Trousdale since January 1969, trying to organize there.

3. During the last afternoon on or about August 19, 1970, Robinson was on the picket line nearby where Cole was sitting in an automobile photographing the activity. Mutual recriminations for a few moments passed between the two wherein Cole accused Robinson of threatening employees about what the Union was going to do. At the same time Cole appeared to threaten Robinson about his role in the ongoing strike. No

blows were struck, and Cole denied that he was "threatening" Robinson in the encounter, according to a witness who was asked by Robinson to take a note of what Cole was doing. Cole is no longer with Marlene and was not present to testify.

4. Both Cole and Robinson paid minor fines in a civil proceeding resulting from this episode.

5. I find that there is insufficient evidence to support the Board's charge that this conduct of Mr. Cole amounted to any such threat, coercion, or intimidation as prohibited by the Court's Order or by the National Labor Relations Act under the meager circumstances adduced in proof.

C. Conclusions

1. This Court has jurisdiction over the subject matter and the parties in this action.

2. The Court's conclusion is that none of the Company's acts at Trousdale under the circumstances, adduced by the proof, sustain the National Labor Relations Board's charges of interference, restraint or coercion in respect to the employees' rights to self-organization.

3. Only one employee or former employee of the Trousdale plant appeared in support of these charges, and he was a striking employee, and his conduct and union activities were in no way affected or shown to have been influenced adversely by Company activities at Trousdale.

III. **Westmoreland, Tennessee Plant**

A. Wage Increases

1. The same part of the Court's cease and desist order referred to in IA 1. and IIA 1. is applicable to the wage increases granted at Westmoreland.

2. The Company[*] granted, on or about July 14, 1969, at its Westmoreland Manufacturing Corporation plant, a wage increase to three of its employees in accord with its general past practices.

3. On or about January 24, 1970, the Westmoreland plant granted wage increases to twenty-seven of its hourly-rated employees in amounts varying from five cents to twenty cents per hour.

4. On or about July 25, 1970, at its Westmoreland Manufacturing Corporation plant, the Company granted wage increases to thirty-three of its hourly-rated employees in amounts ranging from ten cents to twenty cents per hour and in July 1970, the Westmoreland Manufacturing Corporation plant advanced the base rate for piece-rated employees from $1.85 to $2.00 per hour.

5. The I.L.G.W. Union had actively pursued an organizational campaign prior to July 1969. Wage increases had periodically been granted at this plant from 1962 to 1969 both before and during Union organizational efforts. The wage increases granted were similar in character to those previously awarded, and in some instances were required to bring wages in compliance with minimum wage standards, or by reason of necessary adjustments to wage or rate scales because of minimum wage requirements.

6. From approximately 1965 through 1971, the practice at Westmoreland had been generally for the plant manager to review earnings and wages of employees in most categories twice a year. The plant manager would then forward his recommendations with respect to wage adjustments to corporate executives and his supervisors at Marlene Industries. Increases

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[*] "The Company" refers here to Westmoreland Manufacturing Corporation, a wholly owned subsidiary of defendant Marlene Industries Corporation.

granted have brought about proportionately more raises to hourly workers than to production workers on production scales. Practices at Trousdale and Westmoreland plants have been related and generally similar over the years in question. Final decisions about wage adjustments and increases have always been made at Marlene Industries' offices.

7. Picketing began by the Union at Westmoreland on July 16, 1970, and continued to the date of these hearings.

B. Conclusions

1. Petitioner, National Labor Relations Board, has failed to sustain its burden of proof that these wage increases at Westmoreland violated either the National Labor Relations Act or the decree of this Court. Rather, the evidence indicated that the increases in question were grounded upon legitimate economic justification and were in accord with past practices.

IV. **Recommendations**

A. The special master recommends that Marlene Industries Corporation, Decaturville Sportswear Company, Inc., Trousdale Manufacturing Company and Westmoreland Corporation be required to continue to comply fully with and obey this Court's judgment and decree of January 29, 1969.

B. R. C. Brashers should be offered immediate and full reinstatement to his former or substantially equivalent position at Decaturville without prejudice to his seniority as of August 18, 1969.

C. Benny Hamm should be offered immediate and full reinstatement to his former or substantially equivalent position at Decaturville without prejudice to his seniority as of June 15, 1970.

D. Donald Pettigrew should be offered a position at Decaturville equivalent to that made available to others applying for employment with him in the pressing department as of June 23, 1970.

E. R. C. Brashers, Bennie Hamm and Donald Pettigrew should be made whole after supplemental proceedings have been held by the Board to fix a reasonable amount necessary to reimburse said employees, taking into account any mitigating factors, for any losses sustained by reason of Decaturville's failure to employ or re-employ them.

F. Decaturville supervisors should be required to be instructed and cautioned in writing that they may not question or interrogate or interfere with any present or prospective employee with respect to his or her union interest, membership or activity.

G. Decaturville should be required to post a notice on all its bulletin boards for a period of sixty (60) days with a copy to the local President and Secretary of the local I.L.G.W. Union, signed by its plant manager, stating the basic provisions and effects of the Court's order of purgation, if it is held to be in civil contempt, and setting forth that it will affirmatively henceforth not interrogate, lay off, discharge or refuse to rehire employees because of lawful concerted or Union activities, or otherwise in any other manner interfere with, restrain or coerce employees in the exercise of their protected activities. Further, such posted notice shall be placed conspicuously and maintained in a clearly legible condition for said consecutive sixty (60) day period.

H. Peggy Cagle and Judy Maness should be offered a position at Decaturville comparable or substantially equivalent to the positions held by them at their termination when they engaged in concerted activity during June 1970. Said reinstatement should be conditional, however, upon the first availability

of such a position at Decaturville. When and as said Cagle and Maness are reinstated, they shall retain their seniority as of September 8, 1970.

I. Upon request by the I.L.G.W. Union, Decaturville should immediately grant said Union and its representatives reasonable access, for a six month period, to plant bulletin boards.

J. Decaturville employees should be permitted to have reasonable access to said Union organizers during non-working time only at plant approaches and Decaturville parking lots for a period of six months from the issuance date of contempt judgment, if any, subject, however, to reasonable Company regulations in the interests of plant efficiency and discipline.

K. Decaturville should be required at its expense to publish in form to be approved by the National Labor Relations Board in newspapers of general circulation in Decatur County, Tennessee, the essential terms and provisions of the Court's order, once a week for four consecutive weeks, at a reasonable time designated by the Board.

L. All other employees of the Decaturville plant who engaged in concerted activity beginning in June 1970, assertedly protesting unfair labor practices or conditions, and who have made unconditional application for reinstatement or re-employment shall be offered substantially equivalent positions with restoration of seniority rights to the date of their termination in June 1970 (but not during the period of strike prior to unconditional application for reinstatement). Such reinstatement or re-employment shall, however, be made only as and when such positions become available, taking into account the seniority positions and status of such re-applying employees.

M. Decaturville should be required to file a sworn statement with the Court within 20 days after any adjudication of contempt, and again after the posting and/or publishing period specified in G and K showing what specific steps have been taken to comply with the Court's directions and orders.

N. Decaturville should be required to pay all costs and out-of-pocket expenditures incurred by the National Labor Relations Board in connection with investigation and hearing of these proceedings relating to Decaturville only.

O. That the Court take such other and further action and grant such other and further relief as may be deemed just, reasonable and proper in respect of the findings, conclusions and recommendations herewith submitted as to Decaturville, Trousdale and Westmoreland plants.

Respectfully submitted,

/s/ HARRY W. WELLFORD
Special Master

Date: 10-5-73

In the United States Court of Appeals
For the Sixth Circuit

Nos. 18,064
18,154
18,249
18,250
18,256

National Labor Relations Board, Petitioner,

vs.

Decaturville Sportswear Co., Inc., et al., Respondents

MEMORANDUM

On or about October 5, 1973, as Special Master, findings, conclusions and recommendations were issued in these causes

on proceedings involving National Labor Relations Board charges of civil contempt against respondent in respect to its three Tennessee manufacturing plants (at Decaturville, Trousdale and Westmoreland). Reference is made to these findings, conclusions and recommendations as they may bear upon similar charges in these cases with respect to two South Carolina manufacturing plants and the Alabama plant, Frisco Sportswear, referred to herein as Loris, Aynor and Frisco. The Special Master conducted hearings at Florence, South Carolina, in connection with the charges involving the South Carolina plants and at Mobile, Alabama, with respect to the Alabama plant. For specific reference to the underlying decree of the Court of Appeals for the Sixth Circuit, see 406 F.2d 886 (6th Cir. 1969) and the previous findings and conclusions hereinabove referred to.

V. Loris Plant

A. Newspaper Article Findings

1. The International Ladies' Garment Workers' Union, AFL-CIO (herein called "the Union"), has been attempting to organize the Company's employees at its Tennessee, South Carolina and Alabama plants since 1965. During the summer of 1969, the organizing campaign was intensified as a result of the Court's decree, which afforded the Union access to the Company's parking lots and bulletin boards in furtherance of the Union's organizational efforts. The *Loris Sentinel*, which appears in the plants, is a weekly newspaper with circulation in the geographic area in which the towns of Loris and Aynor, South Carolina, and the Loris and Aynor plants are located. Prior to the period in question, the *Loris Sentinel* was customarily found in a newspaper rack located in the lobby next to the personnel office of the Loris plant. The rack, although

located near an entrance, was not the entrance normally used by employees in entering and leaving the plant.

During the summer of 1969, as the Union's organizational drive intensified on several occasions, employees observed copies of this paper on tables in the plant cafeteria. These editions, read and discussed by employees, warned that success by the Union in its campaign would be destructive to the local economy—would take workers "down the road to disaster" and would bring chaos, loss of income and industry, as well as strife to the community. The newspaper also urged employees who had signed Union authorization cards to revoke them and offered suggestions about withdrawing from the Union. Previously, employees had not observed copies of the newspaper, except perhaps a casual few copies, in any area of the plant other than the newspaper rack in the lobby, and previously copies of the paper had not been free. A company official, Epstein, also observed editions of the *Loris Sentinel* in the cafeteria on several occasions during this period of time, but made no attempt to disavow the warnings of consequences pictured therein if the Union were successful. This official (nor any other) made no statement to employees concerning the papers hostile comments about the Union.

B. Wage Increases

1. The company granted a wage increase to 306 of its hourly-rated employees effective July 9, 1969. This wage increase varied in amount from five cents per hour to fifteen cents per hour. In the past, the company had from time to time granted wage increases of similar amounts to employees having the same or equivalent job classifications.

2. The company on or about January 2, 1970, also granted a wage increase to 270 of its hourly-rated employees. The increase it granted was generally in the amount of ten cents

per hour. In addition, in January of 1970, the company advanced the base rate for piece-rated employees from $1.75 to $1.85 per hour. This increase in the base rate did not, however, result in a wage increase to all of the employees compensated on a piece-rate basis. Both the wage increase of ten cents per hour to the hourly-rated employees and the change in the base rate from $1.75 to $1.85 per hour were in accord with the company's practice of granting periodic wage increases and/or changes in the base rate and were motivated, at least in part, by its desire to retain its competitive position in the labor market in the Horry County, South Carolina area.

3. Herman Epstein, General Manager of all South Carolina plants in 1969, who subsequently became manager of the Loris plant in 1970, testified that increases were granted to employees every six months pursuant to past practice. Regarding the increases at the Loris plant, however, Epstein testified that there was no written criteria governing the granting of increases but that it was company policy. He had been directed to grant the increase in July, 1970, by his superior, General Manager Robert Cole, although Cole had not specifically advised him on the granting of increases previously. Epstein testified that the criteria for the increases, based on his own decision, was to bring employees up to employment "standards," considering "job evaluation" and giving employees a "living wage." Seniority played no particular part in granting the increases, although employee merit was a consideration.

4. On or about July 22, 1970, the company granted wage increases to 262 of its hourly-rated employees and increased the base rate for employees compensated on a piece-rate basis of ten cents per hour to the hourly-rated employees and the change in the base rate of $1.85 to $2.00 per hour were in accord with the company's past practice of granting periodic wage increases and/or changes in the base rate and were

motivated, in part, by the company's desire to retain its competitive position in the labor market in the Horry County, South Carolina area.

C. Pressing Department Discharges

1. Delphine Reeves began her employment with Loris Manufacturing Company in February, 1968, and at the time of her discharge on March 23, 1970, was working as a bulk or form presser. Reeves signed a Union card in June of 1969, and a month later began wearing a Union badge in the plant. She was a member of the Union's in-plant organizing committee, and as such, solicited and obtained signed Union authorization cards from other employees and was an active Union adherent. Reeves had two separate conversations with Epstein, the plant manager, relating to her right to wear a Union button and Epstein's admonition that it did not give her any special privileges. Reeves' name appeared in a Union sponsored advertisement in the August 27, 1969 edition of the *Loris Sentinel*. The Company became aware of Reeves' Union activity in 1969, on or before her conversations with Plant Manager Epstein.

2. Postell Goff, Reeves' brother, began his employment with Loris in October of 1967, and was a presser at the time of his discharge. Goff signed a Union card in June of 1969, thereafter volunteered to be an organizer, and was active on the Union's behalf. Goff appeared on a Union sponsored radio program during this period. Goff's signature also appeared in the Union sponsored advertisement in the *Loris Sentinel*. The Company became aware of Postell Goff's Union activity in 1969.

3. On Friday, March 20, 1970, Charles Neeley, a supervisor in the pressing department at the Loris plant, requested Delphine Reeves and Postell Goff, pressers, along with sixteen

other pressing department employees, to work five hours on Saturday, March 21, 1970. Work on Saturday was voluntary and was not considered overtime unless an employee had already worked forty hours prior to the commencement of Saturday work. Reeves and Goff agreed to work and reported at 6:55 Saturday morning, March 21, 1970. At approximately 10:00 A.M. on Saturday morning, March 21, 1970, Reeves and Goff, without permission from their foreman, Charles Neeley, left the pressing area; clocked out; and walked out of the plant. Neeley, a relatively new supervisor, contacted plant manager Herman Epstein and advised him of this development and requested instructions. Epstein told Neeley to notify Olin Roscoe, head of the pressing department, that Reeves and Goff had voluntarily terminated their employment by walking off the job without permission and that they were to be terminated on Monday, March 23, 1970. When Reeves and Goff reported for work on Monday, March 23, 1970, they were taken by Roscoe and Neeley to the personnel office where Epstein advised them that they had walked off the job without permission and were considered by the Company as having voluntarily terminated their employment. Both employees protested to Epstein that Neeley had granted them permission to leave work early the previous Saturday.

Both Reeves and Goff had worked frequently on past Saturdays and had not refused the request of supervisors to do so. Both employees had on occasion requested an opportunity to leave early in the past and had been granted permission to do so without obtaining a sign-out slip. Both had good work records.

D. Refusal to Reinstate Strikers

1. The strike which began at the respondent Company's Decaturville, Tennessee plant on June 23, 1970, resulted in a strike on July 16, 1970, at the Company's Loris and Aynor,

South Carolina plants, of employees who supported the striking employees at the Decaturville plant. Approximately two weeks after the commencement of the strike at Loris, employees Brice Todd, Robert Stephens and Robert Richardson left the plant and joined the strike. Subsequently, Plant Manager Epstein wrote letters to all the striking employees directing them to return to work by a specified date or be replaced. None of these three employees returned by the deadline. Thereafter, however, all three employees quit the strike, and in October of 1970, Todd, Stephens and Richardson visited the plant and unconditionally offered to return to work. Epstein advised them that they had not returned by the date stipulated in the letter sent to them, that replacements had been hired, that the latter would not be discharged and that they would be returned to work as soon as a job became available. Subsequently, Richardson was rehired on November 7, 1970. Stephens was rehired on December 3, 1970. Todd was rehired late in October and was injured in November, 1970.

E. Conclusions

1. This Court has jurisdiction over the subject matter and the parties in this action as to Loris, a wholly owned subsidiary of Marlene Industries, Inc.

2. Although the issues of the *Loris Sentinel* contain anti-union articles which could be categorized as threats, evidence is lacking to establish that the *Loris Sentinel* or its editor were acting as agents of the Company. *NLRB v. Lake Butler Apparel Company*, 392 F.2d 76 (5th Cir. 1968).

3. During the summer of 1969, on several occasions, copies of the *Loris Sentinel*, containing the aforesaid warnings were made freely available to employees of Loris Manufacturing Company on plant premises. Employees could reasonably feel that the Company was utilizing the newspaper as a vehicle for

or means of communication to its employees in predicting economic harm and even possible plant closure in the event of unionization. Under the circumstances, they could reasonably be regarded as threats as well as honest predictions; that the Company took no substantial steps to disavow or disassociate itself from these newspaper accounts. The newspaper, however, was not a Company "agent" and enjoyed the freedom to predict even unreasonable consequences of unionization of the Company plant. The Company should have in some manner disavowed that it was in any way responsible for newspaper policy and opinion.

4. Whether the appearance of these editions of the newspaper in the Loris cafeteria was a violation of the Court's decree depends on the resolution of two issues. First, were the statements protected by the First Amendment and Section 8(c) of the Act or did they impermissibly interfere with, restrain and coerce employees in their protected right to join or assist the Union? Secondly, if the statements did so interfere and coerce, was the Company under any obligation to disavow them?

The test for determining whether statements are constitutionally protected or actionable violations was laid down by the United States Supreme Court in *N.L.R.B. v. Gissel Packing Company*, 575 U.S. 617 (1969) as follows:

> ". . . an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to

> convey a management decision already arrived at to close the plant in case of unionization. • • •
>
> '. . . [c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of the closing is capable of proof." (page 618)

The Company could have disavowed these grave newspaper predictions and advice to foresake the Union, and could have assured its employees that though it was opposed to the Union, it would not take action on its own initiative for reasons unrelated to economic necessities. The Company did neither, but neither did it attempt to adopt the newspaper opinions as its own. See *Amalgamated Clothing Workers v. N.L.R.B.*, 371 F.2d 740, 744 (C.A. D.C., 1966).

5. Regarding all of the wage increases alleged in the petition at Loris, the petitioner failed to sustain its burden of proof that these wage increases violated either the National Labor Relations Act or the decree of this Court. See *NLRB v. Cleveland Trust Co.*, 214 F.2d 95 (6th Cir. 1954) and *Hagopian v. NLRB*, 395 F.2d 947 (6th Cir. 1968). The granting of the wage increases was part of the Company's practice and was grounded in principle measure upon legitimate economic considerations. There was no evidence offered which establishes in a clear and convincing manner that the granting of these wage increases had any substantial adverse effect upon the Section 7 rights of the employees of the company or that the wage increases were granted by reason of antiunion motivation. The Company violated neither the National Labor Relations Act nor the decree of this Court in granting these wage increases. *Louisburg Sportswear Co. v. NLRB*, 462 F.2d 380 (4th Cir. 1972); *Southern Foundation v. NLRB*, 446 F.2d 1063 (6th Cir. 1969); *Hagopian & Sons, Inc. v. NLRB, supra.*

6. Employees, Reeves and Goff, are given the benefit of doubt, consistent with their good records, that they would not have walked out of the Loris plant without any prior notice on March 21, 1970, or absent some misunderstanding about their leaving under all the circumstances. In any event, the Company's action in summarily discharging them, in light of their known Union activities and animus, indicates a disproportionately severe penalty under all the circumstances. Some disciplinary measure may have been indicated, but there is an inference that may be drawn that the harsh results may well have been prompted by anti-union considerations. This conclusion is drawn despite recognition that it is not the Court's function to substitute its judgment in the ordinary case for that of management. *NLRB v. Ogle Protection Service*, 375 F.2d 497 (6th Cir. 1967). *NLRB v. Berry Manufacturer*, 422 F. 2d 748 (10th Cir. 1970) and *NLRB v. Stemum Mfg.*, 423 F. 2d 737 (6th Cir. 1970).

7. There is insufficient clear and convincing proof establishing that picketing at the Loris plant was solely to protest an unfair labor practice. Both Todd and Stephens who joined the picket line admitted that they had walked out of the plant, without notice to the company and without making any effort to advise management of the nature of their grievances, if any. All "concerted activity" is not protected by Section 7 of the National Labor Relations Act. *AHI Machine Tool & Die, Inc. v. NLRB*, 432 F.2d 190 (6th Cir. 1970); *NLRB v. Sunbeam Lighting Company*, 318 F.2d 661 (7th Cir. 1963); *NLRB v. Blades Manufacturing Corporation*, 344 F.2d 998 (8th Cir. 1965). Todd and Stephens joined the pickets in front of the company's plant in Loris in an effort to get a union into the plant, as well as to protest what they considered unfair or unjust practices. They assumed a status of economic strikers who might be subject to permanent replacement under certain conditions. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *NLRB v. Wheatwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB*

v. International Van Lines, 448 F.2d 905 (9th Cir. 1971). Since Todd and Stephens both admitted receiving letters from the company directing them to return within a reasonable time, by failing to return they rendered themselves subject to replacement. The company did, in fact, replace them and did not violate either the National Labor Relations Act or the Court's decree when they were not immediately reinstated when they applied for work on October 5, 1970. The company, within a reasonably short period of time did rehire them. This action is not construed to constitute a violation of the Court's decree.

VI. **Aynor Plant**

A. Wage Increases

1. On or about July 4, 1969, the company granted a wage increase to twenty-seven of its hourly-rated employees in amounts varying from five to fifteen cents per hour.

2. On or about July 7, 1970, the company granted wage increases to forty of its hourly-rated employees in amounts varying from five to twenty cents per hour. On or about January 2, 1970, the company advanced the base rate to piece-rated employees from $1.75 to $1.85 per hour.

3. On or about July 2, 1970 and July 22, 1970, the company granted wage increases to forty-eight of its hourly-rated employees. On or about July 22, 1970, the base rate for piece-rated employees was increased from $1.85 to $2.00 per hour.

4. The increases were not dissimilar to those granted periodically in prior years to employees in this plant. They also coincided with minimum wage increases during the applicable period.

B. Conclusions

1. This Court has jurisdiction over the subject matter and the parties in this action with regard to Aynor, a wholly owned subsidiary of Marlene Industries.

2. The petitioner failed to sustain its burden of proof that these wage increases granted by Aynor violated either the National Labor Relations Act or the decree of this Court. See the authority cited in the Loris conclusions in this respect. The wage increases were part of a practice having legitimate and substantial economic justification. These wage increases were not shown to have had any significant effect upon the Section 7 rights of the employees of the company. They were not shown to have been initiated as a part of any antiunion motivation by the company. It therefore follows, as a matter of law, that the company violated neither the National Labor Relations Act nor the decree of this Court in granting these wage increases. *Louisburg Sportswear Co. v. NLRB*, 462 F.2d 380 (4th Cir. 1972); *Southern Foundation v. NLRB*, 446 F.2d 1063 (6th Cir. 1969); *Hagopian & Sons, Inc. v. NLRB*, 395 F.2d 947 (6th Cir. 1968); and *Louis Allis Company*, 193 NLRB No. 8 (1971).

3. The wage increases at Aynor, as in the case of Loris, were small and not out of character with the relatively poor financial condition of these plants and Marlene Industries at the time.

VII. **Recommendations**

A. The special master recommends that Marlene Industries Corporation, Loris Manufacturing Company, Inc. and Aynor Manufacturing Company, Inc., be required to continue to comply fully with and obey this Court's judgment and decree of January 29, 1969.

B. That Delphine Reeves and Postell Goff be offered immediate and full reinstatement to their former positions at Loris without prejudice to their seniority at March 21, 1970. (The company, however, should be recognized as having a reasonable right to discipline these employees for their early departure from the plant on that date).

C. Loris and Aynor should be enjoined from furnishing free copies to employees of antiunion newspaper articles or issues at these plants and should be required to disavow in the local newspaper and on its bulletin boards the implications and statements made in the newspaper articles filed as exhibits at the hearings before the special master in this cause.

D. Upon request by the I.L.G.W. Union, Loris and Aynor should immediately grant said Union and its representatives reasonable access, for a six month period, to plant bulletin boards.

E. Loris and Aynor should be required at their expense to publish in form to be approved by the National Labor Relations Board in newspapers of general circulation in the area of these two plants, the essential terms and provisions of the Court's Order, once a week for four consecutive weeks, at a reasonable time designated by the Board.

F. All other employees of the Loris and Aynor plants who engaged in concerted activity beginning in June 1970, assertedly protesting unfair labor practices or conditions, and who have made unconditional application for reinstatement or reemployment shall be offered substantially equivalent positions with restoration of seniority rights to the date of their termination in June 1970, (but not during the period of strike prior to unconditional application for reinstatement). Such reinstatement or reemployment shall, however, be made only as and when such positions become available, taking into account the seniority positions and status of such re-applying employees.

G. Loris and Aynor should be required to file a sworn statement with the Court within 20 days after any adjudication of contempt, and again after the posting and/or publishing period specified above, showing what specific steps have been taken to comply with the Court's directions and orders.

H. Loris should be required to pay all costs and out-of-pocket expenditures incurred by the National Labor Relations Board in connection with investigation and hearing of these proceedings relating to Loris only.

I. That the Court take such other and further action and grant such other and further relief as may be deemed just, reasonable and proper in respect of the findings, conclusions and recommendations herewith submitted as to Loris and Aynor.

VIII. **Frisco**

A. Reinstatement of Striking Employees

1. The strike of employees which began at the company's Decaturville, Tennessee plant on June 23, 1970, and subsequently spread to its other Tennessee and South Carolina plants, also precipitated a strike on or about July 15, 1970, of the company's employees at its Frisco City, Alabama, plant, in support of the striking employees at the Decaturville plant. On approximately July 31, 1970, Frisco City employee Randy Montgomery left the plant and joined the strike then in progress. Employee Sandra Matchett joined the strike on August 7, 1970. Subsequently, plant manager Virgil Boen wrote letters to all striking employees, including Montgomery and Matchett, directing them to return to work by a specified date, or be replaced. Neither Montgomery nor Matchett returned by the deadline specified in the letter. Thereafter, Matchett, on November 28,

1970, and Montgomery in early July 1971, quit the strike and returned to the plant unconditionally offering to return to work. Matchett met with plant manager Boen who advised her that he had no openings for her and that, citing the letter which he had sent to her, stated that he had given her a chance to return but that she had refused. Montgomery, who had spent approximately one year on the picket line was told by Boen, upon returning to the plant, that there were no openings. The company refused immediate reinstatement to both Matchett and Montgomery. Neither employee was subsequently reinstated. Boen testified that no other striking employees had offered to return to work. Neither Matchett nor Montgomery returned to seek employment but the one time.

2. The picketing began at the Frisco plant on July 14, 1970, when a group of individuals who had not been previously employed at the Frisco plant appeared outside with picket placards and began picketing. The picketing by these nonemployees of Frisco continued from July 14 until July 31, 1970, when Wayne Jay, Steve Smith and Phillip Baggett, Frisco employees, came by Boen's office and stated that they were walking out because "they wanted more money". At the time the picketing began on July 14, 1970, the Frisco plant employed approximately 400 employees. After picketing began on July 14, 1970, a total of 42 employees of the Frisco plant walked out and joined the picket line.

3. Immediately prior to his joining the strike at approximately 12 noon on July 31, 1970, employee Randy Montgomery testified that his supervisor, Ward Bixler, told him that those employees who "walked out would never work in there no more." If Bixler made this statement, it did not coerce or effectively influence Montgomery's decision to commence picketing and later to request reinstatement. Bixler denied the statement.

4. Montgomery walked out of the plant and joined the pickets because a plant guard would not grant permission to Montgomery to cross the picket line to ask his sister for the keys for a car.

B. Other Company Activities

1. At the time of the commencement of the picketing on July 14, 1970, the plant allowed employees three break periods during each work day in addition to the free time before and after work and during the lunch hour. Additionally, employees were permitted to go to the restrooms as often as necessary but the plant maintained a rule providing that no section should have more than two employees from one section in the restroom at one time during working hours. Employees increased the frequency of their restroom visits with the commencement of the picketing and plant manager, Virgil Boen, instructed supervisors to enforce the plant rule and prohibit employees from congregating and loitering in restrooms where it was suspected they were discussing union activity and membership.

2. During the month of August 1970, Jeanie Brooks, supervisor of the "zipper" section of the sewing room, told several employees under her control that if they left their jobs and joined the strike that: "you'll never get a job here". Brooks, however, did not solicit employee Mary Peeples to submit a written account of statements made to her by pickets as Peeples came into the plant, as Peeples volunteered this information.

3. Other employees asserted that supervisors Bixler and Cross made statements in the summer of 1970, to the effect that if they joined the Union picket line, they would no longer work for Frisco. Though there may have been a slowing of production by reason of the picketing, each supervisor denied making such statement or threats and the employees involved seemed little

influenced by their supervisors with regard to their decisions either to join or to refrain from joining the picketing at the Frisco plant.

4. During the month of August 1970, employee Madie Wormach, had occasion to be in plant manager Boen's office discussing the defective operation of her sewing machine. During the course of the conversation, Boen asked Wormach if she knew anything about union cards being passed around the plant. After denying any knowledge of cards being distributed, Boen asked her if she knew if another employee had any cards. Wormach denied any knowledge thereof.

During her conversation with Boen in his office in August 1970, Boen also asked Wormach if she would let him know when and where Union meetings were taking place. Several weeks later, Boen asked Wormach again if she had any information, but she denied having attended any such meetings. Wormach was equivocal about supporting the Union at the times she was in contact with Boen, and at one point in her testimony stated she "wasn't interested in it."

C. Conclusions

1. This Court has jurisdiction over the subject matter and the parties in this action as to Frisco.

2. There is insufficient clear and convincing evidence to establish that the picketing at the Frisco plant was to protest an unfair labor practice. The first employee who left the plant on or about July 31, 1970, to join the "outside" individuals picketing the plant who had been there since July 14, 1970, did so for economic reasons primarily rather than the subordinate claim or protest of an unfair labor practice. Montgomery's purpose in joining the pickets was to protest the refusal of a plant guard to allow him to cross the picket line and get a key to his car in

accordance with a company policy, an insufficient basis to show an unfair labor practice. Montgomery and Sandra Ann Matchett walked out without making any effort to advise management of the nature of their grievances concerning any alleged unfair labor practice. Since all "concerted activity" is not protected by Section 7 of the National Labor Relations Act, the picketing activities of the Frisco employees were not so protected in this instance. Thus, when Montgomery and Matchett joined the pickets in front of the company's plant in Frisco City in July and August 1970, they assumed the status of economic strikers who are subject to replacement. *NLRB v. MacKay Radio & Telegraph Co.*, 384 U.S. 333 (1938); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. International Van Lines*, 448 F.2d 905 (9th Cir. 1971). They were directed to return to work within a reasonable time and did not, so they thereby rendered themselves subject to replacement. Upon their later reapplication, Frisco did not violate either the National Labor Relations Board or the Court's decree when they were not immediately reinstated when they applied for work. Furthermore, Matchett abandoned the strike on October 5, 1970, but waited until November 28, 1970, to seek re-employment, having failed to obtain a job elsewhere in the interim, thus legally voluntarily terminated her employment or right to re-employment at Frisco. The company committed neither an unfair labor practice nor violated the Court's decree when it failed to reinstate Sandra Ann Matchett and Randy Montgomery on November 28, 1970 and July 5, 1971, respectively.

3. The policy of the company in prohibiting loitering and clustering of employees in the restrooms after the commencement of the picketing during the 1970 summer was not calculated unduly to interfere with the employees in the exercise of their rights conferred by Section 7 of the Act. The frequency of visits to the restrooms by many of the female employees increased after the picketing began and since they were compensated on a production basis, the company's production suffered if con-

gregation and assemblies of employees were permitted to take place in the plant restrooms, even if discussions were about Union activities. Enforcement of the policy did not unreasonably discriminate against the employees who were Union adherents. The employees were not precluded from discussing union matters before or after work or during the lunch period on company premises, or even during appropriate break times. The company supervisors did check the restrooms when more than two female employees left a section at a time during the working day, and remained an unreasonable length of time away from their jobs. The supervisors may have engaged in conduct which created an impression of surveillance by following employees under these circumstances to restrooms, but did not hover over, shadow, or follow employees "engaged in the performance of routine tasks." "The Act, of course, does not prevent an employer from making and enforcing reasonable rules concerning the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours." *Republic Aviation Corporation v. National Labor Relations Board*, 324 U.S. 793, 803 (1945); *Peyton Packing Company*, 49 NLRB 828 (1943); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962). Enforcement of this policy was grounded upon legitimate business justifications and would be expected to result in an increase in the productivity of the employees. Accordingly, it did not constitute an unfair labor practice and did not violate the Court's decree.

4. At least one Frisco supervisor and plant manager, Boen, did interrogate employees about Union activity and initiated possible plant closure or job loss if workers joined the strike at the Frisco plant. This activity, though perhaps in over-all context minimal, did have the tendency (though not necessarily the effect) of restraining, influencing, or soliciting employees away from participation in Union affairs or activities in and about the plant.

IX. **Recommendations**

A. The special master recommends that Marlene Industries Corporation and Frisco Sportswear Co., Inc., be required to continue to comply fully with and obey this Court's judgment and decree of January 29, 1969.

B. Frisco supervisors should be required to be instructed and cautioned in writing that they may not question or interrogate or interfere with any present or prospective employee with respect to his or her union interest, membership or activity.

C. Frisco should be required to post a notice on all its bulletin boards for a period of sixty (60) days with a copy to the local President and Secretary of the local I.L.G.W. Union, signed by its plant manager, stating the basic provisions and effects of the Court's order of purgation, if it is held to be in civil contempt, and setting forth that it will affirmatively henceforth not interrogate, lay off, discharge or refuse to rehire employees because of lawful concerted or Union activities, or otherwise in any other manner, interfere with, restrain or coerce employees in the exercise of their protected activities. Further, such posted notice shall be placed conspiciously and maintained in a clearly legible condition for said consecutive sixty (60) day period.

D. Upon request by the I.L.G.W. Union, Frisco should immediately grant said Union and its representatives reasonable access, for a six month period to plant bulletin boards.

E. Frisco employees should be permitted to have reasonable access to said Union organizers during non-working time only at plant approaches and Frisco parking lots for a period of six months from the issuance date of contempt judgment, if any, subject, however, to reasonable company regulations in the interests of plant efficiency and discipline.

F. Frisco should be required at its expense to publish in form to be approved by the National Labor Relations Board in newspapers of general circulation in the Frisco City, Alabama area, the essential terms and provisions of the Court's order, once a week for four consecutive weeks, at a reasonable time designated by the Board.

G. Frisco should be required to file a sworn statement with the Court within 20 days after any adjudication of contempt, and again after the posting and/or publishing period specified above showing what specific steps have been taken to comply with the Court's directions and orders.

H. Frisco should be required to pay all costs and out-of-pocket expenditures incurred by the National Labor Relations Board in connection with investigation and hearing of these proceedings relating to Frisco.

I. That the Court take such other and further action and grant such other and further relief as may be deemed just, reasonable and proper in respect of the findings, conclusions and recommendations herewith submitted as to Frisco.

Respectfully submitted,

/s/ HARRY W. WELLFORD
Special Master
Date:

APPENDIX G

United States of America
Before the National Labor Relations Board
Twenty-Sixth Region

Marlene Industries Corporation; Decaturville Sportswear Co., Inc.; Westmoreland Manufacturing Corporation; Trousdale Manufacturing Company, Inc.	Case Numbers: 26-CA-3642 26-CA-3646 26-CA-3828 26-CA-5111 26-CA-5112 26-CA-5113 26-CA-5336-1
and	
International Ladies' Garment Workers Union, AFL-CIO.	26-CA-5336-2 26-CA-5355

ORDER CONSOLIDATING CASES AND CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

It having been charged by International Ladies' Garment Workers Union, AFL-CIO, herein called the Union in Case No. 26-CA-3642, Case No. 26-CA-3646 and Case No. 26-CA-3828, that Marlene Industries Corporation, Decaturville Sportswear Co., Inc., Westmoreland Manufacturing Corporation and Trousdale Manufacturing Company, Inc., herein called Respondent Marlene, Respondent Decaturville, Respondent Westmoreland and Respondent Trousdale, respectively; in Case No. 26-CA-5111 that Respondent Marlene and Respondent Decaturville; in Case No. 26-CA-5112 that Respondent Marlene and Respondent Trousdale; in Case No. 26-CA-5113 that Respondent Marlene and Respondent Westmoreland; in Case No. 26-CA-5336-1 that Respondent Marlene and Respondent Westmoreland; in Case No. 26-CA-5336-2 that Respondent Marlene and Respondent Trousdale; and in Case No. 26-CA-5355 that Respondent Marlene and Respondent Decaturville, all said Respondents herein collectively called Respondents, have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Section 151, *et seq.*, herein called the Act, the General Counsel of the Nationel Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Acting Regional Director for the Twenty-sixth Region, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

Hereby Orders, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Acting Regional Director, pursuant to Section 10(b) of the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Order Consolidating Cases and Consolidated Complaint and Notice of Hearing and alleges as follows:

1

(a) The charge in Case No. 26-CA-3642 was filed by the Union on April 6, 1970, and was served on Respondents by registered mail on or about April 7, 1970.

(b) The charge in Case No. 26-CA-3646 was filed by the Union on April 9, 1970, and was served on Respondents by registered mail on or about April 13, 1970.

(c) The charge in Case No. 26-CA-3828 was filed by the Union on October 14, 1970, and was served on Respondents by registered mail on or about October 14, 1970.

(d) The charge in Case No. 26-CA-5111 was filed by the Union on May 20, 1974, and was served on Respondent Marlene and Respondent Decaturville by registered mail on or about May 20, 1974.

(e) The charge in Case No. 26-CA-5112 was filed by the Union on May 20, 1974, and was served on Respondent Marlene and Respondent Trousdale by registered mail on or about May 20, 1974.

(f) The charge in Case No. 26-CA-5113 was filed by the Union on May 20, 1974, and was served on Respondent Marlene and Respondent Westmoreland by registered mail on or about May 20, 1974.

(g) The charge in Case No. 26-CA-5336-1 was filed by the Union on October 21, 1974, and was served on Respondent Marlene and Respondent Westmoreland by registered mail on or about October 21, 1974.

(h) The charge in Case No. 26-CA-5336-2 was filed by the Union on October 21, 1974, and was served on Respondent Marlene and Respondent Trousdale by registered mail on or about October 21, 1974.

(i) The charge in Case No. 26-CA-5355 was filed by the Union on November 11, 1974, and was served on Respondent Marlene and Respondent Decaturville by registered mail on or about November 11, 1974.

2

(a) Respondent Marlene is now, and has been at all times material herein, a corporation with its principal office located

in New York, New York, and is engaged, through wholly-owned subsidiaries, in the manufacture and sale of wearing apparel.

(b) Respondent Decaturville is now, and has been at all times material herein, a corporation and a wholly-owned subsidiary of Respondent Marlene, and is engaged in the manufacture of wearing apparel at its plant located in Decaturville, Tennessee.

(c) Respondent Westmoreland is now, and has been at all times material herein, a corporation and a wholly-owned subsidiary of Respondent Marlene, and is engaged in the manufacture of wearing apparel at its plant located in Westmoreland, Tennessee.

(d) Respondent Trousdale is now, and has been at all times material herein, a corporation and a wholly-owned subsidary of Respondent Marlene, and is engaged in the manufacture of wearing apparel at its plant located in Hartsville, Tennessee.

3

(a) Respondent Marlene, in the course and conduct of its business operations, annually sells and ships products valued in excess of $50,000 directly across state lines to various States of the United States.

(b) During the past 12 months, Respondent Decaturville, in the course and conduct of its business operations, purchased and received at its Decaturville, Tennessee, plant, materials valued in excess of $50,000 directly from points located outside the State of Tennessee, and during the same period of time, it sold and shipped from its Decaturville, Tennessee, plant, goods valued in excess of $50,000 directly to points located outside the State of Tennessee.

(c) During the past 12 months, Respondent Westmoreland, in the course and conduct of its business operations, purchased and received at its Westmoreland, Tennessee, plant, materials

valued in excess of $50,000 directly from points located outside the State of Tennessee, and, during the same period of time, it sold and shipped from its Westmoreland, Tennessee, plant, goods valued in excess of $50,000 directly to points outside the State of Tennessee.

(d) During the past 12 months, Respondent Trousdale, in the course and conduct if its business operations, purchased and received at its Hartsville, Tennessee, plant, materials valued in excess of $50,000 directly from points located outside the State of Tennessee, and, during the same period of time it sold and shipped from its Hartsville, Tennessee, plant, goods in excess of $50,000 directly to points located outside the State of Tennessee.

4

(a) Respondents Marlene, Decaturville, Westmoreland and Trousdale are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

(b) At all times material herein, Respondent Marlene and its wholly-owned subsidiaries, including Respondent Decaturville, Respondent Westmoreland and Respondent Trousdale, have been affiliated businesses with common officers, ownership, directors, and operators and constitute a single integrated business enterprise with said directors and operators formulating and administering a common labor policy for all employees.

5

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6

At all times material herein, the following-named persons occupied the positions set opposite their names and were agents of the Respondents, acting on their behalf, and were supervisors within the meaning of Section 2(11) of the Act:

Charles Meltzer — President of Marlene Industries Corporation

Samuel Meltzer — Treasurer of Marlene Industries Corporation

Lloyd Anderson — Plant Manager, Decaturville Sportswear Company, Inc.

Swan Pollard — Personnel Director, Decaturville Sportswear Company, Inc.

Walter Tanner — Plant Manager, Westmoreland Manufacturing Corporation

Edward Thomas — Plant Manager, Trousdale Manufacturing Company, Inc.

7

On or about June 23, 1970, the below-named employees, all of whom were employed in the pressing department of Respondent Decaturville at its Decaturville, Tennessee, plant, did engage in a strike:

James E. Austin
William O. Baker
Raymond Blackstock
Franklin Brasher
Robert Brigance
Jerry Brown
Billy Camper
Larry Camper
Richard McClure
Ralph Martin
Junior Lee Mayo
Dwight Miller
Jimmy Millner
Melton Moore
Perry Moore
Donald H. Patterson

Elvin Casey
Jefferson P. Clenny
A. B. Coble
Larry Creasy
Denny Crews
Jerry Davis
Austin Evans
James Fisher
Billy Gordon
Lyman Hancock
Ralph Hayes
Fred Horner
Anthony Johnson
Fred A. Jones
Eddie Kelley
Rickey Kennedy
Travis E. Lott
Lynn Lowery
Jimmy Pitts
Jerry Pratt
Dewey Quinn
Curtis R. Renfroe
Jim Rhinehart
Boyd Rhodes
Alton Rogers
Thomas Rogers
Arthur Ross
Harry Rushing
Glenn Scott
John C. Shavers
Bobby Swindle
Robert Tolley
Cecil Walker
Raymond E. White
Grady Wicker

8

Respondent Decaturville, on or about June 23, 1970, at its Decaturville, Tennessee, plant, discharged those employees referred to in paragraph 7 above.

9

Respondent Decaturville discharged those employees referred to in paragraph 7 above, as alleged in paragraph 8 above, and thereafter failed and refused to reinstate or recall said employees, because said employees engaged in the strike referred to in paragraph 7 above or because said employees engaged in other activity protected by Section 7 of the Act.

10

Commencing on or about June 23, 1970, and continuing to on or about April 19, 1974, certain employees of Respondent Decaturville, at Respondent Decaturville's Decaturville, Tennessee, plant, and commencing on or about July 16, 1970, and continuing to on or about April 19, 1974, certain employees of Respondent Westmoreland at Respondent Westmoreland's Westmoreland, Tennessee, plant, and certain employees of Respondent Trousdale at Respondent Trousdale's Hartsville, Tennessee, plant, did engage in strikes at their respective places of work for the purpose of protesting the discharge of those employees referred to in paragraph 7 above and for the purpose of showing their sympathy for those employees referred to in paragraph 7 above, for their having been discharged on June 23, 1970.

11

Respondent Decaturville, by its supervisor and agent, Lloyd Anderson, on or about June 26, 1970, and at times thereafter, sent letters to certain of the striking employees of Respondent Decaturville which read as follows:

> On June 26, 1970, you failed to report for work or left your work station in the plant without notice to your supervisor and joined a group of people who were demonstrating outside the plant.
>
> You are hereby directed to return to work at 7:30 a.m., Monday, June 29, 1970. If you have not reported for work by 4:15 Monday, June 29, 1970, we will hire a new employee to replace you.

12

The strikes referred to in paragraph 10 above were caused by Respondents' unfair labor practices described in paragraph 9 above and said strikes were prolonged by Respondents' unfair labor practices described in paragraph 11 above.

13

On or about April 19, 1974, the below-named employees of Respondent Decaturville, and other employees of Respondent Decaturville, who participated in the strikes described in paragraph 10 above, made unconditional offers to Respondent Decaturville to return to their former or substantially equivalent positions of employment:

Kathryn Hardin	Eula Mae Johnson
Christine Hardison	Nellie Mills
Mary Hart	Carolyn Rushing
Audrey Horner	Nancy Thomas

14

On or about April 19, 1974, the below-named employees of Respondent Westmoreland, and other employees of Respondent Westmoreland, who participated in the strikes described in paragraph 10 above, made unconditional offers to Respondent Westmoreland to return to their former or substantially equivalent positions of employment:

Brenda Filson	Martha Summers
Nancy Graves	Bertha Wheeler
Vicki Hudson	

15

On or about April 19, 1974, the below-named employees of Respondent Trousdale, and other employees of Respondent Trousdale, who participated in the strikes described in paragraph 10 above, made unconditional offers to Respondent Trousdale to return to their former or substantially equivalent positions of employment:

Judy Bacon	Willa Dean Thurmon
Mary Ann Bay	Wanda Smith
Clovis Merryman	

16

Respondents Decaturville, Westmoreland and Trousdale failed and refused, and continue to fail and refuse, to reinstate their employees referred to in paragraphs 13, 14 and 15 above to their former or substantially equivalent positions of employment.

17

(a) If the strikes referred to in paragraph 10 above are found to be unfair labor practice strikes, as alleged, Respondents Decaturville, Westmoreland and Trousdale failed and refused, and continue to fail and refuse, to reinstate their employees referred to in paragraphs 13, 14 and 15 above to their former or substantially equivalent positions of employment because said employees engaged in said strikes.

(b) Alternatively, if the strikes referred to in paragraph 10 above are found not to be unfair labor practice strikes, the employees of Respondents Decaturville, Westmoreland and Trousdale referred to in paragraphs 13, 14 and 15 above are economic strikers who remain entitled to reinstatement and

whom Respondents Decaturville, Westmoreland and Trousdale have failed and refused to reinstate even though their former, or substantailly equivalent, positions of employment have, since they unconditionally applied for reinstatement, became open.

18

In August 1974 and in September 1974, the exact dates being unknown, Respondents Decaturville, Westmoreland and Trousdale caused letters to be sent to certain employees who participated in the strikes described in paragraph 10 above, and who had made unconditional offers to return to work, as described in paragraphs 13, 14 and 15 above, which required said employees to act within seven days to accept or decline offers of reinstatement.

19

By the acts described above in paragraphs 8, 9, 11, 16, 17(a), 17(b) and 18, and by each of said acts, the Respondents did interfere with, restrain and coerce, and are interfering with, restraining and coercing, their employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby did engage in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

20

By the acts described above in paragraphs 16, 17(a) and 17(b), and by each of said acts, Respondents did discriminate, and are discriminating, in regard to the hire or tenure, or terms or conditions of employment of their employees, thereby discouraging membership in a labor organization, and Respondents thereby did engage in, and are engaging in, unfair labor

practices affecting commerce within the meaning of Section 8 (a)(3) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 7th day of September 1976, at 1:00 o'clock in the afternoon (CDST), in the Courtroom, Decatur County Courthouse, Decaturville, Tennessee, and consecutive days thereafter until concluded, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Consolidated Complaint, at which time and place you will have the right to appear in person or otherwise and give testimony. Form NLRB-4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondents shall file with the Regional Director for the Twenty-sixth Region, acting in this matter as agent for the National Labor Relations Board, an original and four (4) copies of an Answer to said Consolidated Complaint within ten (10) days from the service thereof, and that unless they do so, all of the allegations in the Consolidated Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of their Answer, Respondents shall serve a copy thereof on each of the parties.

Dated at Memphis, Tennessee, this 29th day of June 1976.

/s/ JOHN F. HARRINGTON
Acting Director
Region 26
National Labor Relations Board
746 Clifford Davis Federal Building
167 North Main Street
Memphis, Tennessee 38103

APPENDIX H

United States of America
Before the National Labor Relations Board
Twenty-Sixth Region

Marlene Industries Corporation; Decaturville Sportswear Co., Inc.; Westmoreland Manufacturing Corporation; Trousdale Manufacturing Company, Inc.	Cases Nos. 26-CA-3642 26-CA-3646 26-CA-3828 26-CA-5111 26-CA-5112 26-CA-5113 26-CA-5336-1
and	
International Ladies' Garment Workers Union, AFL-CIO	26-CA-5336-2 26-CA-5355

AMENDMENT TO CONSOLIDATED COMPLAINT

Order Consolidating Cases, Consolidated Complaint and Notice of Hearing having issued on June 29, 1976 pursuant to charges filed by International Ladies' Garment Workers Union, AFL-CIO, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for Region Twenty-six, pursuant to Section 10(b) of the Act and Section 102.15 and 102.17 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Amendment to Consolidated Complaint, amending the Consolidated Complaint in this matter in the following particulars, to wit:

1

Paragraph 13 of the Consolidated Complaint is amended so as to reflect as follows:

On or about April 19, 1974, the below-named employees of Respondent Decaturville, and other employees of Respondent Decaturville, who participated in the strikes described in paragraph 10 above, made unconditional offers to Respondent Decaturville to return to their former or substantially equivalent positions of employment:

Martha Aedle
Shirley Alexander
Blanche Aurett
Carrie Austin
James Earl Austin
Mary Lou Baker
William Baker
Ralph Barnett
Phyllis Bartholomew
Sarah Bedwell
Patricia Bivens
Raymond Blackstock
Joyce Blankenship
Booker F. Brasher
Rubye Brasher
Mae Brewer
Robert Brigance
Jerry T. Brown (Ted)
Gloria Campbell
Martha Campbell
Billy Camper
Larry Camper
Patty Camper
Brenda Chappell
J. P. Clenney
Sue Clenney
Dean Coats
A. B. Coble
Loran Cotham
Randy Courtwright
Larry Creasy
Dorothy Crossnor
Danny Cruise
Jerry W. Davis
Sheila Davis
William Davis
Emily Day
Nancy Dyer
Judy Eason
Max Larry Essary
Melba E. Ferrell
Robert Golley
Betty Jo Gooch
Bobbie Goodman
Dinah Griggs
Mary Grooms
Melba Grooms
Lyman Hancock
Kathryn Hardin
Christine Hardison
Jimmy W. Hardison
Mary Hart
Dianne Hayes
Mary (Hayes) Grooms
Ralph E. Hayes
Nina Hedgepath
Ray J. Hensley
Catherine Holiday

Audry Horner
Ben Horner
Fred Horner
Vera Mae Horner
Brenda Inman
Carol Inman
Gail Inman
Betty Jo Ivey
Ruby Jennings
Anthony Johnson
Bobbie Johnson
Eual Mae Johnson
Joey Johnson
Mary Johnson
Sue Johnson
Fred Jones
Gary Jones
Melba Jones
Bill Keats
Rickey Kennedy
Linda Leasure
Mary Helen Lindsey
Lynn Lowery
Junior Mayo
Rick C. McClue
Dorothy McDaniel
William McEarl
Bernard Mervhill
Linda Millinder
Dwight Millner
Faye Millner
Jimmy N. Millner
Wanda Montgomery
Randy Moody
Rondald E. Moyes
Bonnie Newman
Joyce Newman
Joann Oguinn
Vickie Parrish
Hazel Patterson
Patty Patterson
Billy Pearcy
Mary Ruth Pearcy
Mickey Pearcy
Benny Perry
Bobbie Perry
Nettie J. Petterson
Zenobia Pettigrew
Jimmy Dale Pitts
Mary R. Pratt
Dewey D. Quinn
Zora Quinn
Faye Railey
Regina Reeves
Curtis Renfroe
David Renfroe
James Renfroe
Helen Sims Rhodes
Diane Roach
Marie Roach
Phillip Robbins
Mary Roberson
Julie Robertson
Alton Rogers
Danny Lee Rogers
Thomas Rogers
Author Rose
Carolyn Rushing
Christine Rushing
Harry Rushing
Janey Rushing
Mae Rushing

Paulette Rushing
Glen Scott
Judy Maness Scott
Linda Scott
Sue Nell Scott
Dorothy Shelton
John Shoverr
Parker Spence
Doris A. Stanfill
Ruth Stanfill
Shirley Stout
Susie Stout
Bob Swindle
Doris Tharp
Lorine Tharp
Nancy Thomas
Art Townsend
Shirley F. Vise
Cecil Walker
Tommy Walker
Nancy Wallace
Stella Ward
Joyce Weatherford
Raymond E. White
Grady Wicker
Jettie Wicker
Linda Williams
Peggy Woods
Lona Wylie
Frances Yarbo
Jane Yarbo

2

Paragraph 14 of the Consolidated Complaint is amended so as to reflect as follows:

On or about April 19, 1974, the below-named employees of Respondent Westmoreland, and other employees of Respondent Westmoreland, who participated in the strikes described in paragraph 10 above, made unconditional offers to Respondent Westmoreland to return to their former or substantially equivalent positions of employment:

Melinda Brawner
Mary Ruth Cannon
Darlene Carter
Mary Ruth Carter
Frances Coulter
Denise Driver
Margaret Driver
Brenda Filson
Myrtle Gammons
Fannie J. Gann
Mary N. Graves
Nancy Graves
Patsy Gulley
Barbara Hammock
Joyce Hammock
Rickie Hudson
Barbara Hyde
Donald Key

Corine Cannon Miller
Linda Sadler
Martha Summers
Linda Thompson
Sheila Trout
Bertha Wheeler
Naomi White
Kenneth Wix

3

Paragraph 15 of the Consolidated Complaint is amended so as to reflect as follows:

On or about April 19, 1974, the below-named employees of Respondent Trousdale, and other employees of Respondent Trousdale, who participated in the strikes described in paragraph 10 above, made unconditional offers to Respondent Trousdale to return to their former or substantially equivalent positions of employment:

Judy Bacon
Mary Ann Bay
Donna Carter
Shirley Carter
Betty Cassetty
Glenda Daniel
Ricky Dickens
Athatlene East
Barbara Nell Gammons
Patricia Rose Gammons
Bobbie Gregory
Geraldine Gregory
Polly K. Henley
Sally Jo Hiett
Shirley Fay Humes
Brownie Johns
Larry Jones
Carolyn Kelton
Paul King
Sue King
James McClard
Ruby McClard
Shirley (Carter) McClard
Clovis Meryman
Belvie Nash
Willa Dean Patterson
Virginia Raney
Dorothy Ray
Alma Scruggs
Lonie Smith
Wanda Smith
Gloria Spears
Linda Spears
Donnie Steen
Willa D. Patterson Thurman
Mary Tuttle
Betty Wilson
Sherry Jones
Donald Bergdorf
Roger Bullock
Jerry Sewell

Please Take Notice that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Respondents, and each of them, shall file with the Regional Director acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Amendment to Consolidated Complaint within ten (10) days from the service thereof, and that unless they do so, all of the allegations in the Amendment to Consolidated Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, each Respondent shall serve a copy thereof on each of the other parties.

Dated at Memphis, Tennessee, this 17th day of August, 1976.

/s/ JOHN F. HARRINGTON
Acting Regional Director
National Labor Relations Board
Region 26
Clifford Davis Federal Building
Room 746
167 North Main Street
Memphis, Tennessee 38103

APPENDIX I

United States of America
Before the National Labor Relations Board
Region 11

Marlene Industries Corporation; Aynor Manufacturing Company, Inc.; Loris Manufacturing Company, Inc.	
and	Case Numbers:
International Ladies' Garment Workers' Union, AFL-CIO.	11-CA-5748 11-CA-5749

ORDER CONSOLIDATING CASES, COMPLAINT AND NOTICE OF HEARING

It having been charged by the International Ladies' Garment Workers' Union, AFL-CIO, herein called the Union, in Cases Nos. 11-CA-5748 and 11-CA-5749, that Marlene Industries Corporation, Aynor Manufacturing Company, Inc., and Loris Manufacturing Company, Inc., hereinafter respectively called Respondent Marlene, Respondent Aynor, and Respondent Loris, have engaged in, and are now engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Eleventh Region, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay,

HEREBY ORDERS, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act, and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Order Consolidating Cases, Complaint and Notice of Hearing, and alleges as follows:

1

The charge in Case No. 11-CA-5748 was filed on May 20, 1974, and was served on Respondent on May 20, 1974.

The charge in Case No. 11-CA-5749 was filed on May 20, 1974, and was served on Respondent on May 20, 1974.

2

(a) Respondent Marlene, is now, and has been at all times material herein, a corporation with its principal office located in New York, New York, and is engaged, through wholly-owned subsidiaries, in the manufacture and sale of wearing apparel.

(b) Respondent Aynor, is now, and has been at all times material herein, a corporation and a wholly-owned subsidiary of Respondent Marlene, and is engaged in the manufacture of wearing apparel at its plant located in Aynor, South Carolina.

(c) Respondent Loris, is now, and has been at all times material herein, a corporation and a wholly-owned subsidiary of Respondent Marlene, and is now engaged in the manufacture of wearing apparel at its plant located in Loris, South Carolina.

3

(a) Respondent Marlene, in the course of conduct of its business operations, annually sells and ships products valued in ex-

cess of $50,000 directly across state lines in various states of the United States.

(b) During the past twelve months, Respondent Aynor, in the course and conduct of its business operations, purchased and received at its Aynor, South Carolina, plant, materials valued in excess of $50,000 directly from points located outside the State of South Carolina, and, during the same period of time, it sold and shipped from its Aynor, South Carolina, plant, goods valued in excess of $50,000 directly to points located outside the State of South Carolina.

(c) During the past twelve months, Respondent Loris, in the course and conduct of its business operations, purchased and received at its Loris, South Carolina, plant, materials valued in excess of $50,000 directly from points located outside the State of South Carolina, and, during this same period of time, it sold and shipped from its Loris, South Carolina, plant, goods valued in excess of $50,000 directly to points located outside the State of South Carolina.

4

(a) Respondent Marlene, Aynor, and Loris are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

(b) At all times material herein, Respondent Marlene and its wholly-owned subsidiaries, including Respondent Aynor and Respondent Loris, have been affiliated businesses with common offices, ownership, directors, and operators constitute a single integrated business enterprise with said director and operators formulating and administering a common labor policy for its employees.

5

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6

At all times material herein, the following-named persons occupied the positions set opposite their names and were agents of the Respondents, acting on their behalf, and were supervisors within the meaning of Section 2(11) of the Act:

Charles Meltzer —President of Marlene Industries Corporation

Samuel Meltzer —Treasurer of Marlene Industries Corporation

Herman Epstein —Plant Manager, Aynor Manufacturing Company, Inc.

Leonard F. Moore —Plant Manager, Loris Manufacturing Company, Inc.

7

(a) On or about June 23, 1970, certain employees of Respondent Marlene employed at its wholly-owned manufacturing subsidiary located in the Decaturville, Tennessee (Decaturville Sportswear Company, Inc.) ceased work concertedly and went on strike;

(b) On or about July 16, 1970, certain employees of Respondent Marlene employed at its Aynor, South Carolina, manufacturing subsidiary (Respondent Aynor), ceased work concertedly and went on strike;

(c) On or about July 16, 1970, certain employees of Respondent Marlene employed at its Loris, South Carolina, manufacturing subsidiary (Respondent Loris), ceased work concertedly and went on strike;

(d) The strike activity described above in subparagraphs (a), (b) and (c) was caused and/or prolonged by the unfair labor practices of Respondent Marlene;

(e) Alternatively the strike activity described above in subparagraphs (a), (b) and (c) was economic in nature.

8

(a) Commencing on or about April 19, 1974, and thereafter, the following employees employed by Respondent Marlene at the Aynor, South Carolina, facility, who had engaged in the strike referred to in paragraph 7(b), above, made unconditional offers to return to Respondent Marlene and Respondent Aynor to return to work:

Sarah Allen	Cathy Martin
Ernestine Almeida	Myrna Rabon Martin
Ila Mae Cannon	Nannie Martin
Mildred Dew	Jeanette Mincey
Delores Evans	Gracie Rabon
June Johnson	Gerry Skipper
Millie Lane	Velma Small
Lucy Larrimore	

(b) Since on or about April 19, 1974, Respondent Aynor has failed and refused, and is continuing to fail and refuse, to reinstate the employees named in subparagraph (a) above;

(c) Since on or about April 19, 1974, Respondent Aynor has failed and refused, and continues to fail and refuse, to reinstate the employees named in subparagraph (a) above, for

the reason that said employees had joined or assisted the Union, engaged in other protected, concerted activities for the purpose of mutual aid or protection and/or participated in the strike referred to in paragraph 7(b), above;

(d) By the acts and conduct described in subparagraphs (b) and (c), above, and by each of said acts and conduct, Respondent Aynor has caused the strike referred to in paragraph 7(b), above, to be prolonged.

9

(a) Commencing on or about March 7, 1974, and thereafter, the following employees employed by Respondent Marlene at the Loris, South Carolina, facility, who had engaged in the strike referred to in paragraph 7(c), above, made unconditional offers to Respondent Marlene and Respondent Loris to return to work:

Eula Mae Bellamy	Clovel Goff
Harvey Bellamy	Ethel Hammond
Deborah Booth	Carolyn Harden
Marilyn Boswell	Lloyd Harrelson
Ronald Brown	Linda Hickman
John A. Bryant	Marion Hooks
Corley Causey	Cecil Nell Hughes
Ester Edwards	Floosie Jernigan
Delores Evans	Phyllis (Mishoe) Johnson
Linda Faircloth	Frances Larrimore
Sharon Faircloth	Jackie Lewis
Billy Maw Floyd	Keith Lewis
Mike Floyd	Elaine Livingston
Mary Alice Fowler	Freddie M. McLumbee
Williams Dale Fowler	Bonnie Martin Sellers
Myrtis Galloway	Marie Mincy
Linda Gause	Terry Norris
Charles Graham	Winston Norris

Doris Powell
Larry Rhodes
Mary E. Sarvis
Mike Sellers
Barbara Small
Patty Small Bryant
Velma Small
Winston Soles
Clyde Strickland
Sandra Strickland
Shirley Strickland
Lawrence V. Stroud
Thershia Tompkins
Mildred McDowell Waddell
Bonnie Watts
Debbie Williamson
Ola Mae Jacobs
Inez Johnson
Millie Lane

(b) Since on or about March 7, 1974, Respondent Loris has failed and refused, and is continuing to fail and refuse, to reinstate the employees named in subparagraph (a), above;

(c) Since on or about March 7, 1974, Respondent Loris has failed and refused, and continues to fail and refuse, to reinstate the employees named in subparagraph (a), above, for the reason that said employees had joined or assisted the Union, engaged in other protected, concerted activities for the purpose of mutual aid or protection and/or participated in the strike referred to in paragraph 7(c), above;

(d) By the acts and conduct described in paragraphs (b) and (c), above, and by each of said acts and conduct, Respondent Loris has caused the strike referred to in paragraph 7(c), above, to be prolonged.

10

By the acts and conduct described above in paragraphs 8(b), (c), and (d), and 9(b), (c), and (d), above, and by each of said acts and conduct, Respondent Marlene, Respondent Aynor, and Respondent Loris, respectively, having engaged in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3), and Section 2(6) and (7) of

the Act, for which Respondent Marlene, Respondent Aynor, and Respondent Loris are jointly and severally liable.

PLEASE TAKE NOTICE that on the 7th day of September, 1976, at 1:00 p.m., CDST, in the Courtroom, Decatur County Court House, Decaturville, Tennessee, and consecutive days thereafter until concluded, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in this Consolidated Complaint, at which time and place you will have the right to appear in person or otherwise and give testimony. Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that pursuant to Section 102.20 and Section 102.21 of the Board's Rules and Rgulations, Series 8, as amended, Respondent shall file with the Regional Director for the Eleventh Region, acting in this matter as agent for the National Labor Relations Board, an original and four (4) copies of an Answer to said Consolidated Complaint within ten (10) days from the service thereof, and unless they do so, all the allegations in the Consolidated Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately after the filing of their answer, Respondents shall serve a copy thereof on each of the other parties.

Dated at Winston-Salem, North Carolina, this 17th day of August, 1976.

/s/ REED JOHNSTON
Regional Director
National Labor Relations Board
Region 11
447 Federal Building
251 North Main Street
Winston-Salem,
North Carolina 27101

APPENDIX J

United States of America
Before the National Labor Relations Board
Region 9

In the Matter of

Marlene Industries Corporation

and Case No. 9-CA-8610

Russell Sportswear Corporation

and Case No. 9-CA-8888

International Ladies' Garment Workers Union, AFL-CIO.

ORDER CONSOLIDATING CASES AND CONSOLIDATED COMPLAINT

It having been charged by International Ladies' Garment Workers Union, AFL-CIO, herein called the Union, in Case No. 9-CA-8610, and by Delores Pemberton, Janit Burchett, Beverly Burchett and Olza Thomas, Individuals, herein called Pemberton, in Case No. 9-CA-8888, that Marlene Industries Corporation and Russell Sportswear Corporation, respectively, herein individually called Respondent Marlene and Respondent Russell, respectively, and collectively called Respondents, have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for Region 9, having duly considered the matter and deeming it necessary in order to

effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

Hereby Orders, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Order Consolidating Cases and Consolidated Complaint and alleges as follows:

1. (a) The charge in Case No. 9-CA-8610 was filed by the Union on June 27, 1974, and was served on Respondents by registered mail on June 28, 1974.

(b) The charge in Case No. 9-CA-8888 was filed by Pemberton on October 22, 1974, and was served on Respondent Russell by registered mail on October 25, 1974.

2. (a) Respondent Marlene is now, and has been at all times material herein, a corporation with its principal office located in New York, New York, and is engaged, through wholly-owned subsidiaries, in the manufacture and sale of wearing apparel.

(b) Respondent Russell is now, and has been at all times material herein, a corporation and a wholly-owned subsidiary of Respondent Marlene and is engaged in the manufacture of wearing apparel at its plant located in Russell Springs, Kentucky.

(c) Respondent Marlene, in the course and conduct of its business operations, annually sells and ships products valued in excess of $50,000 directly across state lines to various states of the United States.

(d) Dur[illegible]g the past 12 months, Respondent Russell, in the course and conduct of its business operations, purchased and

received at its Russell Springs, Kentucky plant, materials valued in excess of $50,000 directly from points located outside the State of Kentucky and, during the same period, it sold and shipped from its Russell Springs, Kentucky plant goods valued in excess of $50,000 directly to points located outside the State of Kentucky.

(e) Respondent Marlene and Respondent Russell are now, and have been at all times material herein, "employers" engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

(f) At all times material herein, Respondent Marlene and its wholly-owned subsidiaries, including Respondent Russell, have been affiliated businesses with common officers, ownership, directors and operators and constitute a single integrated business enterprise with said directors and operators formulating and administering a common labor policy for all employees.

3. At all times material herein, the Union is, and has been, a "labor organization" as defined in Section 2(5) of the Act.

4. At all times material herein, the following-named persons occupied the positions set opposite their respective names and were agents of Respondents, acting on their behalf, and were supervisors within the meaning of Section 2(11) of the Act:

Charles Meltzer — President
Marlene Industries Corporation

Samuel Meltzer — Treasurer
Marlene Industries Corporation

Gordon Taylor — Plant Manager
Russell Sportswear Corporation

Boyd Wilson — Personnel Manager
Russell Sportswear Corporation

5. On or about June 23, 1970, certain employees of the Decaturville Sportswear Co., Inc., herein called Decaturville, a corporation and a wholly-owned subsidiary of Respondent Marlene engaged in the manufacture of wearing apparel at its plant located in Decaturville, Tennessee, ceased work concertedly and went on strike.

6. On or about June 23, 1970, Decaturville discharged the employees referred to in paragraph 5, above, and thereafter failed and refused to reinstate or recall said employees because they had engaged in the strike referred to in paragraph 5, above, or because they had engaged in other activity protected by Section 7 of the Act.

7. Commencing on or about May 4, 1971, and various dates thereafter, and continuing to on or about April 15, 1974, certain employees of Respondent Russell, at its Russell Springs, Kentucky plant, ceased work concertedly and went on strike for the purpose of protesting the discharges of the employees referred to in paragraph 5, above, and for the purpose of showing their sympathy for those employees referred to in paragraph 5, above, for having been discharged on or about June 23, 1970.

8. Respondent Russell, by its supervisor and agent, Boyd Wilson, on or about May 5, 1971, and at times thereafter, sent letters to certain of the striking employees of Respondent Russell which state, *inter alia*, as follows:

> On May 4, 1971 [or various appropriate dates thereafter], you failed to report for work, and joined a group of people who were demonstrating outside our plant. You are hereby directed to return to work Friday, May 7, 1971 [or various appropriate dates thereafter], at 7:00 a.m. If you have not reported for work by 3:45 p.m., Monday, May 10, 1971 [or various appropriate dates thereafter, five days

after date of letter], we will hire a new employee to replace you and will mark your records accordingly.

* * * * * * * *

On May 26, 1971 [or various appropriate dates thereafter], you left your work station in the plant without notice to your supervisor, and joined a group of people who were demonstrating outside our plant.

You are hereby directed to return to work Tuesday, June 1, 1971 [or various appropriate dates thereafter], at 7:00 a.m. If you have not reported for work by 3:45 p.m., Wednesday, June 2, 1971 [or various appropriate dates thereafter, five days after date of letter], we will hire a new employee to replace you and will mark your records accordingly.

9. The strike referred to in paragraph 7, above, was caused by Respondent Marlene's and Decaturville's unfair labor practices described in paragraph 6, above, and was prolonged by Respondents' unfair labor practices described in paragraph 8, above.

10. (a) On or about April 15, 1974, the below-named employees of Respondent Russell who participated in the strike described in paragraph 7, above, made unconditional offers to Respondent Russell to return to their former or substantially equivalent positions of employment:

Betty Bray
Susie Burton
Alice Chumbley
Brenda Childress
Mary Foley
Doris Flanagan
Leda Harting
Jennifer Johnson
Marcella Lawless
Bessie Mann
Arthur McQueary
Connie McQueary
Nathan Norman
Eva Ping
Ann Popplewell
Sherlene Popplewell

Zelma Popplewell
Imogene Roy
Louise Robertson
Violet Sullivan
Geroldene Stephens
Ronni Tucker
Bernice West
Mittie Westley
Karen Wisdom

(b) On or about October 11, 1974, the below-named employees of Respondent Russell who participated in the strike described in paragraph 7, above, made unconditional offers to Respondent Russell to return to their former or substantially equivalent positions of employment:

Beverly Burchett
Janit Burchett
Delores Pemberton
Olza Thomas

(c) Respondent Russell failed and refused, and continues to fail and refuse, to reinstate their employees referred to in paragraph 10, subparagraphs (a) and (b), above, to their former or substantially equivalent positions of employment.

11. (a) If the strikes referred to in paragraphs 5 and 7, above, are found to be unfair labor practice strikes, as alleged, Respondent Russell failed and refused, and continues to fail and refuse, to reinstate their employees referred to in paragraph 10, subparagraphs (a) and (b), above, to their former or substantially equivalent positions of employment because those employees engaged in the strike described in paragraph 7, above.

(b) Alternatively, if the strikes referred to in paragraphs 5 and 7, above, are not found to be an unfair labor practice strikes, the employees of Respondent Russell referred to in paragraph 10, subparagraphs (a) and (b), above, and others whose names are unknown to the Regional Director, are economic strikers

who remain entitled to reinstatement and whom Respondent Russell has failed and refused to reinstate, even though their former or substantially equivalent positions of employment have, since they have unconditionally applied for reinstatement, become open.

12. By the acts described above in paragraphs 8, 10(c), 11(a) and 11(b), and by each of said acts, the Respondents did interfere with, restrain and coerce, and are interfering with, restraining and coercing, their employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby did engage in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

13. By the acts described above in paragraphs 10(c), 11(a) and 11(b), and by each of said acts, Respondents did discriminate, and are discriminating, in regard to the hire or tenure or terms or conditions of employment of their employees, thereby discouraging membership in a labor organization, and Respondents thereby did engage in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

You are hereby notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondents shall file with the undersigned Regional Director, acting in this matter as an agent of the Board, an original and four (4) copies of an Answer to said Consolidated Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations of the Consolidated Complaint shall be deemed to be admitted to be true and shall be so found by the Board. *Immediately upon the filing of its Answer, Respondents shall serve a copy thereof on each of the other parties.*

Form NLRB-4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

Dated at Cincinnati, Ohio, this 8th day of September, 1976.

/s/ EMIL C. FARKAS
Regional Director
Region 9
National Labor Relations Board
3003 Federal Office Building
550 Main Street
Cincinnati, Ohio 45202

Attachment

APPENDIX K

United States of America
Before the National Labor Relations Board
Fifteenth Region

Marlene Industries Corporation;
Frisco Sportswear, Inc.;
M. Hoffman & Company, Inc.; and
Landlubber Alabama, Inc.

and Case No. 15-CA-4834

International Ladies' Garment
Workers' Union, AFL-CIO

COMPLAINT

It having been charged by International Ladies' Garment Workers' Union, AFL-CIO (herein called Union), that Marlene Industries Corporation, Frisco Sportswear, Inc., M. Hoffman & Company, Inc., and Landlubber Alabama, Inc. (herein respectively called Respondent Marlene, Respondent Frisco, Respondent Hoffman, and Respondent Landlubber), have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (herein called the Act), the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director of the Board's Fifteenth Region, issues this complaint pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, and alleges as follows:

1

The charge against Respondents was filed by the Union with the undersigned Regional Director on April 19, 1973, a true copy of which was duly served on each Respondent on or about said date.

2

(a) Respondent Marlene, a New York corporation with its principal offices located in New York, New York, is, and at all times material herein has been, engaged, through wholly owned subsidiaries, in the manufacture and distribution of wearing apparel;

(b) In the course and conduct of its business operations, Respondent Marlene annually sells and ships products valued in excess of $50,000 directly across state lines to various states of the United States;

(c) At all times material herein, Respondent Marlene has been, and is now, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3

(a) Respondent Frisco, an Alabama corporation and wholly owned manufacturing subsidiary of Respondent Marlene, had been engaged in the manufacture of wearing apparel at its plant in Frisco City, Alabama, until on or about December 1, 1972;

(b) During each of the several years of its operations, Respondent Frisco annually purchased and received at its Frisco City, Alabama, location materials and supplies valued in excess of $50,000 directly from points located outside the State of

Alabama, and, during this same period, Respondent Frisco annually manufactured, sold and shipped wearing apparel valued in excess of $50,000 from its location directly to points located outside the State of Alabama;

(c) At all times material herein, Respondent Frisco has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4

At all times material herein, Respondent Marlene and its wholly owned manufacturing subsidiaries, including Respondent Frisco, have been affiliated businesses with common officers, ownership, directors and operators and constitute a single integrated business enterprise (hereinafter collectively referred to as Respondent Marlene) with the said directors and operators formulating and administering a common labor policy for all employees.

5

(a) Respondent Hoffman, a corporation licensed to and doing business in various states of the United States and with its principal offices located in Boston, Massachusetts, is, and at all times material herein has been, engaged in the manufacture and distribution of wearing apparel;

(b) In the course and conduct of its business operations, Respondent Hoffman annually sells and ships products valued in excess of $50,000 directly across state lines to various states of the United States;

(c) At all times material herein, Respondent Hoffman has been, and is now, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

6

(a) Respondent Landlubber, a Delaware corporation duly licensed to and doing business in the State of Alabama and a wholly owned manufacturing subsidiary of Respondent Hoffman, has been engaged in the manufacture of wearing apparel at its plant in Frisco City, Alabama, since on or about December 1, 1972;

(b) During the past 12 months, which period is representative of all times material herein, Respondent Landlubber, in the course and conduct of its business operations, purchased and received at its Frisco City, Alabama, location, materials and supplies valued in excess of $50,000 directly from points located outside the State of Alabama and manufactured, sold and shipped wearing apparel valued in excess of $50,000 from its location directly to points outside the State of Alabama;

(c) At all times material herein, Respondent Landlubber has been, and is now, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

7

At all times material herein, Respondent Hoffman and Respondent Landlubber have been affiliated businesses with common officers, ownership, directors and operators and constitute a single integrated business enterprise (hereinafter referred to collectively as Respondent Hoffman), with the said directors and operators formulating and administering a common labor policy for all employees.

8

The Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

9

(a) On or about December 1, 1972, Respondent Hoffman purchased from Respondent Marlene the physical assets of Respondent Marlene at Frisco City, Alabama, including said factory, land and premises, machinery, equipment and inventory, and assumed the liabilities theretofore incurred by Respondent Marlene in connection with an outstanding mortgage on said premises;

(b) On or about December 1, 1972, all employees (except those employees on strike as described in paragraph 12(b), *infra*) and supervisory personnel of Respondent Marlene at the Frisco City, Alabama, facility, were transferred to the payroll of Respondent Hoffman as part of Respondent Hoffman's continuation of substantially the same garment manufacturing operations formerly engaged in by Respondent Marlene at Frisco City, Alabama;

(c) Since on or about December 1, 1972, Respondent Hoffman has been, and continues to be, the successor of Respondent Marlene in connection with the operation of the Frisco City, Alabama, facility.

10

Since on or about December 1, 1972, the following named persons have occupied the positions set forth opposite their respective names, and have been, and are now, agents of Respondent Hoffman, acting on its behalf in connection with the operation of the Frisco City, Alabama, facility, and are supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act:

Herbert S. Hoffman	—	President
Julius S. Cohen	—	Vice President
Virgil Boen	—	General Manager
James Byrd	—	Assistant Plant Manager
Dot Phillips	—	Personnel Manager
George Hall	—	Production Manager
Andrew Crawford	—	Cutting Room Manager
Johnny Womach	—	Shipping Room Manager
Jeanne Brooks	—	Supervisor
Florabelle Skinner	—	Supervisor
Ernestine Wright	—	Supervisor
Anagene Norris	—	Supervisor
Louise King	—	Supervisor

11

Until on or about December 1, 1972, the following named persons occupied the positions set forth opposite their respective names, and had been, and were then, agents of Respondent Marlene, acting on its behalf in connection with the operation of the Frisco City, Alabama, facility, and were supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act:

Virgil Boen	—	General Manager
James Byrd	—	Assistant Plant Manager
Dot Phillips	—	Personnel Manager
George Hall	—	Production Manager
Andrew Crawford	—	Cutting Room Manager
Johnny Womack	—	Shipping Room Manager
Jeanne Brooks	—	Supervisor
Florabelle Skinner	—	Supervisor
Ernestine Wright	—	Supervisor
Anagene Norris	—	Supervisor
Louise King	—	Supervisor

12

(a) On or about June 23, 1970, certain employees of Respondent Marlene employed at its wholly owned manufacturing subsidiary located in Decaturville, Tennessee (Decaturville Sportswear Co., Inc.), ceased work concertedly and went on strike;

(b) On or about July 15, 1970, certain employees of Respondent Marlene employed at its Frisco City, Alabama, manufacturing subsidiary (Respondent Frisco), ceased work concertedly and went on strike;

(c) The strike activity described above in subparagraphs (a) and (b) was caused and/or prolonged by the unfair labor practices of Respondent Marlene, which unfair labor practices are the subject of the civil contempt proceedings presently before the United States Court of Appeals for the Sixth Circuit in the matter of *National Labor Relations Board v. Decaturville Sportswear Co., Inc., et al.*, Nos. 18,064; 18,154; 18,249; 18,250; and 18,256;

(d) Alternatively, the strike activity described above in subparagraphs (a) and (b) was economic in nature.

13

(a) Commencing on or about December 27, 1972, and thereafter, on January 11 and 19, and May 7 and 8, 1973, and April 19, 1974, the following employees employed by Respondent Marlene at the Frisco City, Alabama, facility, who had engaged in the strike referred to in paragraph 12(b), above, made unconditional offers to Respondent Marlene and Respondent Hoffman to return to work:

Ora D. Austin	Rebecca Montgomery
Judy S. Baggett	Randy Montgomery
Phillip H. Baggett	Shirley Montgomery
Ruth Bailey	Melvin Mose
John B. Blanton	Jencie Lee Penn
Malcolm Blanton	Mary L. Peoples
James Allen Bodiford	Frances Phillips
Mary Bradley	Evelyn C. Richardson
Aileen W. Cork	Lula Riley
Charles Cork	Helen Lemmon Skinner
Barbara Dale	Steve Smith
Octavia Dean	Lila Strother
Evelyn Hellinger	Willie M. Thornton
Mary E. Hill	Eloise Tuberville
Wayne F. Jay	Gwendolyn Wesley
Mary A. Lee	Willie Wesley
Mary N. Madison	Madia Womack
Sandra Matchett	Jewell Woods

(b) Since on or about December 27, 1972, Respondent Hoffman has failed and refused, and is continuing to fail and refuse, to reinstate the employees named in subparagraph (a), above;

(c) Since on or about December 27, 1972, Respondent Hoffman has failed and refused, and continues to fail and refuse, to reinstate the employees named in subparagraph (a), above, for the reason that said employees had joined or assisted the Union, engaged in other protected concerted activities for the purpose of mutual aid or protection and/or participated in the strike referred to in paragraph 12(b), above;

(d) By the acts and conduct described in subparagraphs (b) and (c), above, and by each of said acts and conduct, Respondent Hoffman has caused the strike referred to in paragraph 12 (b), above, to be prolonged.

14

By the acts and conduct described in paragraph 13(b), (c) and (d), above, and by each of said acts and conduct, Respondent Marlene and Respondent Hoffman have engaged in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act, for which Respondent Marlene and Respondent Hoffman are jointly and severally liable.

You Are Hereby Notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondents shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an answer to the above complaint within 10 days from the service thereof, and that unless they do so, all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, the Respondents shall serve a copy thereof on each of the other parties.

Dated at New Orleans, Louisiana, this 4th day of June, 1974.

/s/ CHARLES M. PASCHAL, JR.
Regional Director, Region 15
National Labor Relations Board
Suite 2700 Plaza Tower
1001 Howard Avenue
New Orleans, Louisiana 70113

Supreme Court, U. S.
FILED
AUG 11 1978
MICHAEL RODAK, JR., CLERK

No. 77-1839

In the Supreme Court of the United States

OCTOBER TERM, 1978

DECATURVILLE SPORTSWEAR CO., INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Petitioners contend that the court of appeals erred in holding that the Board's order, directing its Administrative Law Judge to conduct a hearing on the General Counsel's unfair labor practice complaint, was not a final order reviewable by the court of appeals under 29 U.S.C. 160(f).

1. The background of the current proceeding may be summarized as follows:

In 1969 the court of appeals affirmed the Board's finding that petitioners had engaged in certain unfair labor practices and enforced the Board's order remedying those violations of the Act. *Decaturville Sportswear Co.* v. *National Labor Relations Board*, 406 F. 2d 886 (C.A. 6). Thereafter, the Board petitioned the court to adjudge

the companies in civil contempt for allegedly failing to comply with the enforcement decree. In particular the Board contended that petitioners had violated the decree by discharging an employee, Nelson Rushing, in 1970, by discharging other workers who struck and picketed in sympathy with Rushing, by denying reinstatement to sympathy strikers, and by discharging and refusing to hire employees because of their union activities or sympathies. A special master, appointed by the court, recommended granting the Board's contempt petition in certain respects and denying it in others (Pet. App. A-30 to A-93).

The court of appeals affirmed the special master's findings in all respects. In affirming the special master's recommendations against enforcing the contempt petition in certain respects, the court stated:

> To hold Respondents in civil contempt we must find clear and convincing evidence in the record which proves that Respondents have violated a judgment of this Court. * * * A contempt proceeding is a setting very different from a normal proceeding for the enforcement of a Board order. The burden imposed by the clear and convincing evidence standard is heavy. The Board has failed to demonstrate that the Special Master erred in his findings or conclusions.

National Labor Relations Board v. *Decaturville Sportswear Co.*, 518 F. 2d 788, 790 (C.A. 6). The Board's petition for a writ of certiorari to review that decision was denied on October 20, 1975. 423 U.S. 913.

Subsequently, in 1976, the General Counsel issued unfair labor practice complaints (later consolidated) against petitioners, who had been the subject of the earlier contempt petition, and three affiliated companies not

involved in the earlier contempt proceedings (Pet. App. A-94 to A-136).[1] The complaint charged the companies with unfair labor practices relating to the strikes and picketing resulting from the discharge of Rushing and other employees at the Decaturville plant in 1970. Specifically the complaint alleged that the companies denied reinstatement to more than 350 strikers, including some 60 strikers involved in the earlier contempt proceeding against petitioners, in violation of Section 8(a)(1) and (3) of the Act (Pet. App. A-102 to A-105, A-107 to A-110, A-116 to A-119, A-124 to A-126, A-134 to A-136).[2] A hearing on the consolidated complaint was scheduled before an Administrative Law Judge (Pet. App. A-105). On April 7, 1977, the Administrative Law Judge recommended dismissal of the consolidated complaint in its entirety on the ground that the earlier contempt determination barred litigation of the unfair labor practice issues, under principles of "*res judicata* or *collateral estoppel*" (Pet. App. A-23 to A-29).

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[1]The three additional companies are Russell Sportswear Corporation; M. Hoffman & Company, Inc.; and Landlubber Alabama, Inc. (Pet. App. A-120, A-128).

[2]Although employees at the plant of Russell Sportswear Corporation also struck in sympathy with Rushing and the other Decaturville strikers and were discharged and subsequently denied reinstatement, the Board did not assert those discharges in its contempt petition against petitioners. Rather it initiated a separate unfair labor practice proceeding with respect to the discharge and denial of reinstatement of the Russell employees. In 1973 the court of appeals first denied enforcement of the Board's order which found that Russell had committed unfair labor practices, but then vacated its judgment and remanded the matter to the Board for further evidentiary proceedings. *National Labor Relations Board* v. *Russell Sportswear Corp.*, 71 CCH Lab. Cas. para. 13,667, 72 CCH Lab. Cas. para. 13,905. Those proceedings were then consolidated with the unfair labor practice complaint against petitioners (see Pet. App. A-21 to A-22).

On September 16, 1977, the Board reversed the Administrative Law Judge's holding that "a contempt proceeding, such as the *Decaturville* decision, which involves an application of the 'clear and convincing evidence' standard, cannot bar a subsequent unfair labor practice proceeding involving a different cause of action, different parties, and a 'preponderance of the evidence' burden of proof" (Pet. App. A-16). The Board ordered that the record be reopened and a hearing held on the unfair labor practice complaint before the Administrative Law Judge (Pet. App. A-16 to A-17).

On December 29, 1977, the companies filed a petition in the court of appeals to review the Board's order and stay the unfair labor practice hearing (Pet. App. A-4 to A-13). The Board moved to dismiss the petition to review on the ground that its order directing a hearing on the unfair labor practice complaint was not a "final order," subject to judicial review under Section 10(f) of the Act.[3] On March 30, 1978, the court of appeals issued an order dismissing the petition to review and denying the request for a stay of the unfair labor practice hearing (Pet. App. A-1 to A-2). The court held that the order of the Board sought to be reviewed "is not a final order within the meaning of § 10(f) of the National Labor Relations Act" and that, "upon the conclusion of

[3]Section 10(f), 29 U.S.C. 160(f) provides, in relevant part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

the administrative hearing and the issuance of a proper order by the Board, the petitioners, if still aggrieved, will be able to seek review in this Court" (Pet. App. A-2).[4]

3. The court below correctly determined that the Board's order reopening the record and directing a further hearing is not a final order reviewable in the courts of appeals under Section 10(f) of the Act. See *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 409: "The statute on its face * * * indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices * * *." As the court of appeals noted (Pet. App. A-2), if the Board ultimately finds that petitioners have committed unfair labor practices, as alleged in the complaint, and issues an order remedying the violations found, petitioners may secure judicial review at that time of all of their claims, including the claim that the Board's findings and remedies are barred by *res judicata* or collateral estoppel. On the other hand, the Board may find in petitioners' favor on the merits of the complaint, and thus make recourse to the court of appeals or this Court unnecessary. That statutory procedure provides an adequate and exclusive remedy for alleged error in unfair labor practice proceedings before the Board, while at the same time serving the interest of judicial economy. *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 48; *Thompson Products* v. *National Labor Relations Board*, 133 F. 2d 637, 640 (C.A. 6); *Sears, Roebuck and Co.* v. *National Labor Relations Board*, 433 F. 2d 210, 211 (C.A. 6).[5]

[4]The court's order (Pet. App. A-1 to A-2) also denied a motion that the Board had filed in the contempt proceeding requesting that the court clarify its decision there by holding that it was not intended to bar the Board from litigating the pending unfair labor practice issues under principles of *res judicata* or collateral estoppel.

[5]Cases cited by petitioners (Pet. 13-14) are inapposite. In *International Union of Mine, Mill & Smelter Workers, Local*

Petitioners' effort to enjoin the unfair labor practice proceeding in advance of a final adjudication of the complaint is "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem, supra*, 303 U.S. at 50-51. Contrary to petitioners' suggestion (Pet. 14), the expense, time, and effort involved in litigating the case before the Board does not justify an exception to the rule requiring exhaustion. *Id.* at 51. Contrary to petitioners' contention (Pet. 12-13), an exception to the exhaustion and final order doctrine is not warranted by their claim that the issues now before the Board have been determined favorably to them in prior proceedings before the court of appeals. See *Armco Steel Corporation* v. *Ordman*, 414 F. 2d 259, 260-261 (C.A. 6). That contention may be reviewed, under the

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Nos. 15, 17, 107, 108 and 111 v. *Eagle-Picher Mining & Smelting Company*, 325 U.S. 335, the Court held that the Board could not reopen an unfair labor practice proceeding, with a view to providing additional relief, where it had already issued a final remedial order and that order had merged into a final court decree with which the employer had long since complied. All other cases cited by petitioners involve situations in which the courts held that agency action was ripe for judicial review because no further proceedings were contemplated and the complaining party had no other avenue of relief available. See *Waterway Terminals Company* v. *National Labor Relations Board*, 467 F. 2d 1011, 1015, 1017 (C.A. 9) (employer sought review of order quashing notice of hearing in lieu of determining alleged jurisdictional dispute under Section 10(k) of the Act); *International Ladies' Garment Workers Union, Local 415-475* v. *National Labor Relations Board*, 501 F. 2d 823, 830 (C.A. D.C.) and *Leeds & Northrup Company* v. *National Labor Relations Board*, 357 F. 2d 527, 531-533 (C.A. 3) (charging party sought review of withdrawal of an unfair labor practice complaint, pursuant to informal settlement, and denial of an evidentiary hearing on objections to settlement).

normal statutory review procedure, if petitioners are aggrieved by the final order issued by the Board on completion of the unfair labor practice proceeding.[6]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

AUGUST 1978.

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[6]Since the court of appeals never reached the merits of petitioners' *res judicata*/collateral estoppel arguments (Pet. App. A-1 to A-2), the second question sought to be presented by the petition (pp. 3, 15-22) is not properly before the Court. Petitioners' arguments in any event are insubstantial. As the Board noted, the difference between the "clear and convincing" standard of proof applicable in contempt proceedings and the "preponderance of the evidence" standard appliable in unfair labor practice proceedings would preclude the invocation of *res judicata* or collateral estoppel even if the parties or factual issues were the same. See, *e.g.*, *Peterson* v. *Clark Leasing Corp.*, 451 F. 2d 1291, 1292 (C.A. 9). Cf. *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235. Petitioners' argument (Pet. 15-22) makes no reference to the differences in burden of proof.

DOJ-1978-08